

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 September 2003

CASE NO.: 2003-AIR-8

In the Matter of:

LUIS MICHAELS,
Complainant,

v.

PLANET AIRWAYS,
Respondent.

APPEARANCES:

Martin E. Leach, Attorney
For Complainant

Caran Rothchild, Attorney
Ivonne Barroso, Attorney
For Respondent

BEFORE:

Stephen L. Purcell
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the whistleblower provisions of section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (hereinafter "AIR21" or "the Act"), 49 U.S.C. § 42121, as implemented by 29 C.F.R. Part 1979. This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or any other provision of Federal law relating to air carrier safety. 49 U.S.C. § 42121(a); 29 C.F.R. § 1979.100.

Procedural Background

Luis Michaels (“Complainant”) filed a complaint with the Department of Labor (“DOL”) alleging that Planet Airways (“Respondent”) discriminated against him in violation of AIR21. The Secretary found no violation had occurred, and Complainant sought review of that decision and a formal hearing pursuant to 49 U.S.C. § 42121(b)(4)(a) and 29 C.F.R. § 1979.106(a).

On December 3, 2002, this matter was referred to the Office of Administrative Law Judges. A Notice of Hearing and Prehearing Order was issued scheduling a formal hearing in Miami, Florida to commence March 3, 2003. At the request of the parties, the hearing date was changed to April 1, 2003. The hearing began as scheduled and concluded on April 4, 2003. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence, submit oral arguments, and file post-hearing briefs. The following exhibits were admitted into evidence: Administrative Law Judge Exhibits (“ALJX__”) 1 and 2, Joint Exhibits (“JX__”) 1-96, 104-109, and Respondent’s Exhibit (“RX__”) 110.¹ Post-hearing briefs were received from Complainant on July 14, 2003 and from Respondent on July 17, 2003.

I. ISSUES

1. Whether Respondent is an air carrier subject to AIR21?
2. Whether Complainant engaged in activities which are protected by AIR21?
3. Whether Respondent actually or constructively knew of, or suspected, such activity?
4. Whether Complainant suffered an unfavorable personnel action?
5. Whether Complainant’s activity was a contributing factor in the unfavorable personnel action?

¹ Complainant’s Exhibits 1-4, 6, 8-17, 19-27, 30-31, 33-35, and 38-45 were admitted into evidence but subsequently withdrawn by Complainant after his counsel acknowledged that all such exhibits were included in the exhibits submitted by Respondent (Tr. 430). The parties thereafter agreed that all exhibits would be identified as Joint Exhibits bearing the exhibit numbers utilized by Respondent (Tr. 431, 892). RX-110, a December 12, 2001 letter authored by Respondent’s Human Resources Manager which recommended the termination of VP and Director of Operations Frank Barber, was objected to by Complainant as irrelevant to these proceedings (Tr. 659). The exhibit was admitted as relevant and responsive to the testimony of Frank Barber during Complainant’s case-in-chief (Tr. 660).

6. Whether Respondent has demonstrated by clear and convincing evidence that it would have taken the unfavorable personnel action irrespective of Complainant's having engaged in protected activity?

II. SUMMARY OF THE EVIDENCE

Luis Michaels

During his direct examination, Luis Michaels testified that he was born, raised, and educated in Peru (Tr. 74). He attended civil aviation college there and later came to the United States to further his training as a pilot. *Ibid.* He is rated as a transport pilot in nine different countries, including the United States, and he has 33 years of aviation experience with a clean record (Tr. 74-5). He began flying at age 24 as a copilot on a passenger jet in Peru, was elevated to the position of captain at age 30, and has retained that rank for the past 28 years (Tr. 79). He was hired as a captain by Planet Airways in September 2000 to fly Boeing 727 aircraft (Tr. 85-6). He remained there until March 13, 2002 (Tr. 87).

A few months after Complainant was hired at Planet Airways, Bob Laberge left as Chief Pilot, and the position was subsequently filled by, among others, Jeffrey Sicular, Zane Kelleher, Jerry Davis, Dick Capon, and Jim Phinney (Tr. 88-90). Pilots, including Complainant, reported to the Chief Pilot, the Chief Pilot reported to the Director of Operations who, during this period, was Frank Barber, and the Director of Operations reported to the President of Planet Airways (Tr. 94).

In October 2001, Complainant received a letter of commendation from Jim Phinney, who was then Chief Pilot, for his handling of a charter flight from Fort Lauderdale, Florida to Des Moines, Iowa when the aircraft experienced a hydraulic failure (Tr. 95). Complainant's relationship with Phinney at that time was good, and he was happy to have him as Chief Pilot (Tr. 97).

According to Complainant, after receiving the letter of commendation from Phinney, he became involved in a whistleblower investigation brought by Don Landry, another Planet Airways pilot who had been in Complainant's training class when he was initially hired (Tr. 97). Landry was fired by Planet Airways and called Complainant to ask for his assistance with an upcoming unemployment compensation hearing (Tr. 101-02). When Complainant thereafter appeared at the hearing, Frank Barber, who was not expected to be there, gave Michaels a "Notice of Intent to Reprimand" (Tr. 102-03, JX-19).² After the hearing, Complainant met with Barber and then-

² Although Complainant believed that the hearing occurred approximately a month after receiving the October 2001 commendation letter from Phinney, the letter he received from Barber is dated August 28, 2001 (JX-19). On cross-examination, Complainant further elaborated on his receipt of the August 28, 2001 letter from Barber and about driving from Miami to Fort Lauderdale later on the day he received the letter to meet with Barber and Dick Capon (Tr. 289-

Chief Pilot Dick Capon in Barber's office to discuss the letter, at which time Barber said that no reprimand would be issued and tore up the letter (Tr. 105).

Approximately one month after Landry's unemployment compensation hearing, Michaels was contacted by Landry and asked to assist in an investigation initiated by OSHA after Landry complained that Planet Airways had a practice of scheduling illegal flight crew sequences and ignoring mechanical malfunction reports (Tr. 106-07). Complainant thereafter spoke with OSHA Investigator Mike Moon by phone and subsequently met with him for about three and one-half hours at a local hotel (Tr. 106-07). Either before or after the meeting, Complainant also provided Landry with an affidavit to give to Investigator Moon (Tr. 108).

On January 28, 2002, Complainant received a telephone call from DeAnna Desmond in Planet Airways' scheduling department and was asked to come to Respondent's headquarters the following day to meet with Investigator Moon (Tr. 110). Complainant met with Investigator Moon as scheduled and informed him that Planet Airways was continuing to schedule flight crews for duty in an illegal manner and that Complainant was now being harassed (Tr. 111). Investigator Moon suggested that Michaels file his own OSHA complaint against Planet Airways, which Complainant did shortly thereafter (Tr. 112-13, 116, JX-65).

Michaels's OSHA complaint alleged that he had been harassed by Frank Barber and Jim Phinney in retaliation for assisting in the OSHA investigation of Landry's complaint (Tr. 119-21, JX-65). According to Complainant, he had received three letters of a "derogatory nature" since his participation in the Landry investigation: a January 19, 2002 letter from Jim Phinney relating to trash being left by him in the cockpit of an aircraft (JX-27); a January 21, 2002 letter from Jim Phinney regarding an alleged Customs clearance violation on December 16, 2002 [sic] (JX-28); and a January 28, 2002 memorandum from Jim Phinney (JX-32) relating to Complainant's alleged refusal to cooperate with Tracy Gold regarding a January 4, 2002 audit of his technical publications (Tr. 121-28).

With respect to the January 19, 2002 letter from Phinney, Complainant testified that it had been placed in his personnel mail box at Planet Airways headquarters with several approach charts attached thereto (Tr. 123). Phinney's letter indicated that "[t]he next crew found the enclosed charts in Aircraft 742," and Complainant was asked to "please clean these things up after your trip [if time permits]" (Tr. 124, JX-27). Michaels wrote on the letter "Captain Jim Phinney, this garbage is not mine," and then placed the letter and charts in Phinney's personnel mail box. *Ibid.*

According to Complainant, the January 21, 2002 letter referencing the alleged Customs clearance violation was hand-delivered to him on January 22, 2002 by Jim Phinney upon Michaels's return to Fort Lauderdale from a flight to the Bahamas (Tr. 125, 129, 132, JX-29). The letter refers to an attached letter to Michaels dated December 20, 2002 [sic] and asks for a response from Complainant by 5:00 p.m. local time on January 22, 2001 [sic] (JX-28). In an

315). A report written by Dick Capon notes the date of the meeting as August 29, 2001 (JX-21).

email to Phinney dated January 22, 2002, Complainant objected to being given only four hours to respond to a matter which occurred thirty-seven days prior to the time it was brought to his attention (JX-29). Complainant stated that he never saw the December 20th letter prior to that time and thus could not have responded to the alleged violation as requested by Phinney. He also stated that he was informed by his senior flight attendant, Tina Straus, while the aircraft was in Nassau that the flight had been precleared by Customs. He also testified that he was instructed by Planet Airways maintenance control personnel when the flight arrived in Fort Lauderdale to park the aircraft at the Amerijet ramp in a remote parking area of the airport suggesting to him that the flight had been precleared by Customs (Tr. 129-30, 132-33 JX-29).

According to the January 28, 2002 memorandum from Phinney to Complainant, Tracy Gold, an employee in the Technical Publications office of Planet Airways, had raised some issues with Phinney related to an audit of Complainant's assigned manuals (JX-32). According to the memorandum, Michaels failed to bring all manuals assigned to him to the audit, refused to properly fill out certain documentation relating to the manuals, and was missing revisions to one of the manuals. Phinney also indicated that he wanted to speak with Michaels regarding "[t]he manner in which you spoke to your co-worker, Ms. Tracy Gold." *Ibid.* Complainant testified he was never asked to bring any manuals with him when he reported to Technical Publications, and further stated he did not refuse to fill out any documents, he never received the revisions which were noted as missing, and he spoke to Ms. Gold in a "respectful manner" (Tr. 135).

Based on having received these three letters from Phinney in a nine day period, Complainant believed Planet Airways was retaliating against him because of his involvement in the investigation of Landry's OSHA complaint (Tr. 136-37). Complainant further testified that he had seen a similar pattern of activity by Planet Airways involving Captains Landry and Insua (Tr. 137). According to Michaels, the activities described in the three letters, even if true, were so minor that they would not normally result in any reprimand by Planet Airways supervisors, and that is why he filed his own complaint with OSHA Investigator Moon (Tr. 138).

Complainant testified that on January 13, 2002, six days before receiving the first of the three letters from Phinney, he complained to Planet Airways personnel that a flight sequence he was scheduled to begin that day required him to fly more hours in a twenty-four hour period than was permitted under Federal Aviation Administration ("FAA") regulations (Tr. 139). Michaels testified that, after reporting this apparent violation to Kelly Raphael in the scheduling department, he was told to speak to Jim Phinney (Tr. 143-44, 146, JX-60). According to Complainant, after Phinney reviewed the schedule, he told Michaels that flying only part of the scheduled flight – from Fort Lauderdale, Florida to Elko, Nevada³ – would not violate FAA regulations and Phinney then directed Complainant to fly the airplane to Elko and await further instructions (Tr. 149). Michaels complied and, by the time he arrived in Elko, he had flown seven hours and ten minutes of the eight hours flight time allowed during a twenty-four hour period

³ Although referred to by Complainant as "Elkhorn," the correct name of the Nevada town is Elko.

under FAA regulations. *Ibid.* After his arrival in Elko, Complainant called Planet Airways and reported to DeAnna Desmond that FAA regulations required he and his crew be given a break of 16 hours and 35 minutes before the next leg of the flight (Tr. 150-51). After their telephone conversation, Michaels received via facsimile a revised flight crew sequence, which he testified still did not comply with FAA regulations (Tr. 152). Complainant then called Planet Airways and spoke with Jeffrey Sicular, the officer on duty, who subsequently told Michaels to bring the plane back to Fort Lauderdale because “[w]e lost the contract” (Tr. 152-53). Michaels believed Planet Airways lost approximately \$50,000 as a result of the cancellation of the last leg of the trip (Tr. 154). At some point after the flight, Complainant completed a “Trip Envelope” on which he recorded the times and required rest periods for the flight to Elko because he knew it would go to Frank Barber for review (Tr. 155-56, JX-61).

Michaels testified that Human Resources Manager Carell Rodriguez was hired by Respondent sometime around October 2001 and that Rodriguez contacted Michaels in December of 2001 to request they meet at Complainant’s home (Tr. 159, 161). Although Complainant thought the request was unusual, he agreed to the meeting (Tr. 161). Complainant testified that, when Rodriguez arrived at his home, he stated that he had been hired by Planet Airways to fire Frank Barber and wanted to ask Michaels some questions (Tr. 162-62). Michaels told Rodriguez he did not believe Rodriguez had the authority to fire Barber and asked if he had any objection to Don Landry joining them at Michael’s home (Tr. 163-64). When Rodriguez said he did not, Complainant called Landry and, after he arrived at Michaels’s residence, the three of them talked about Frank Barber (Tr. 165). Rodriguez utilized Complainant’s personal computer to prepare a four-page document containing questions posed to, and answers given by, Michaels during the meeting (Tr. 170-71, JX-107).

On February 1, 2002, Complainant was directed to meet with Frank Barber, Carell Rodriguez, and Jim Phinney in Barber’s office at Planet Airways (Tr. 158).⁴ The purpose of the meeting was to discuss the issues raised in the three letters sent to Complainant by Jim Phinney (Tr. 171-72). According to Complainant, after he explained his actions with respect to the three incidents at issue, Barber, Rodriguez, and Phinney were satisfied with his explanations and he left the meeting (Tr. 175-76).

One or two days later, according to Complainant, he met with Rodriguez concerning the OSHA complaint Michaels filed (Tr. 176). Rodriguez allegedly told Complainant that he had spoken with Respondent’s owners and they had agreed to “clean” his file. *Ibid.* Complainant further testified that, during this meeting, Rodriguez received a call from OSHA Investigator Moon and told Moon that Michaels was going to withdraw his complaint (Tr. 177). Michaels stated, however, that when Rodriguez handed him the phone to confirm that he was withdrawing

⁴ Although Michaels testified the meeting occurred on February 2, 2002, a handwritten note by Carell Rodriguez made the day of the meeting shows that it actually occurred on February 1, 2002 (JX-33).

his complaint, Michaels told Moon that he would not withdraw his complaint until he was satisfied that his file had been “cleaned.” *Ibid.*

Approximately one week later, Complainant inspected his personnel file and discovered that the three letters from Phinney were still in the file (Tr. 178). Complainant also testified that there were a number of other items in the file to which he objected. *Ibid.* Among these items was a letter dated February 4, 2002 from Phinney to Michaels which referred to the December 16, 2001 incident during which Complainant allegedly failed to preclear Customs before leaving Nassau for Fort Lauderdale (Tr. 179, JX-34). Complainant testified that, when he informed Rodriguez that that letter was not supposed to be in his file, Rodriguez wrote “VOID” at the top of the document (Tr. 180). The letter also bore a handwritten note at the bottom, apparently signed by Carell Rodriguez, which stated: “On 2/16/02 Jim Phinney and I discussed this action in detail. After much consideration, we decided to reduce this action to a coaching session (- no written warning.)” (JX-34). According to Michaels, he did not know when that note was appended to the letter (Tr. 181). Complainant further testified that, based on his dissatisfaction with the way his file had been “cleaned,” he informed Rodriguez that he did not intend to withdraw his OSHA complaint and wanted to meet with Tony DeCamillis, the President of the company (Tr. 181-82).

Michaels testified that he met with DeCamillis at Respondent’s office in Fort Lauderdale about two days later for approximately one and one-half hours (Tr. 184). Prior to the meeting, Complainant had prepared a list of “talking points” and utilized that list as a reminder of the items he wanted to discuss during the meeting (Tr. 184, 188, JX-25). Michaels testified that DeCamillis was very attentive during the meeting and took copious notes (Tr. 196). Complainant also testified that he gave DeCamillis his list of “talking points” and was told they would meet again in approximately one week, by which time the matters about which Michaels was complaining would be “fixed” (Tr. 197).

According to Complainant, he only flew one day during the entire month of February 2002 (Tr. 198). He further testified that other Planet Airways pilots were flying overtime during that period. *Ibid.* Michaels acknowledged that his contract with Respondent guaranteed that he be paid \$85 per hour for sixty hours flying time per month, whether he flew that much or not, and that he received overtime pay of \$103 per hour for any time in excess of sixty hours (Tr. 199). He testified that paying overtime pay to other pilots when he had flown only one day during the month was a “very poor utilization of crews.” *Ibid.*

Michaels stated that he received a telephone call from Jim Phinney on March 13, 2002 and was told that DeCamillis wanted to see him (Tr. 199-200). Complainant told Phinney that it would take him two hours to get to the office but that if DeCamillis was willing to wait that long he would meet with him (Tr. 200). According to Complainant, when he eventually arrived at Respondent’s Fort Lauderdale office, Carrel Rodriguez took him to the office of Joe Gleason, the new Director of Operations, where he was informed that DeCamillis was not available (Tr. 201-02). Michaels further testified that he was then informed by Gleason that his employment with

Respondent had been terminated effective immediately (Tr. 202). On his way out of the building, according to Complainant, he asked Rodriguez whether he would receive a letter of termination and was informed he would not. *Ibid.*

Before going home from his meeting with Gleason, Complainant called Don Landry and Eduardo Insua, both of whom had been terminated but later rehired as pilots for Planet Airways, and arranged to meet with them (Tr. 203-4). Michaels testified that, while meeting with Landry and Insua at Insua's home, he called DeCamillis on his cell phone and was told by DeCamillis that he was not aware of, and did not authorize, Claimant's termination (Tr. 205). Complainant further testified that DeCamillis assured him the matter would be investigated and he would call him the following day (Tr. 205-06).

On March 14, 2002, according to Complainant, he sent a letter to OSHA Investigator Mike Moon after speaking with him by phone that day (Tr. 206, 208-09, JX-69). In the letter, Michaels informed Moon that he had been fired by Joe Gleason the previous day and that Gleason refused to give him a reason for the termination (JX-69). The letter further described a prior meeting with DeCamillis to discuss harassment of Michaels by Jim Phinney, and also described the telephone conversation Complainant had with DeCamillis the evening of March 13th. *Ibid.*

Complainant testified that he also sent an email to Carell Rodriguez on March 14th (Tr. 210, JX-70). Michaels's email noted his disappointment with Rodriguez's collusion with Jim Phinney in summoning him to the Fort Lauderdale office "under false pretenses," and also stated that he had spoken the previous day with DeCamillis who denied any knowledge of Michaels's termination (JX-70). When Complainant did not get a response to his email by the following day, he forwarded copies to DeCamillis and Barber (Tr. 211). According to Complainant, he sent a copy of the email to Barber because he believed Barber should know about Michaels's December 2001 meeting with Rodriguez, during which Rodriguez said he had been hired to fire Frank Barber (Tr. 212).

On March 19, 2002, DeCamillis responded to Complainant's email (Tr. 212, JX-71). In his response, DeCamillis described as inaccurate various statements made by Michaels in his March 14th email, including, *inter alia*, Complainant's assertion that DeCamillis denied having knowledge of, or giving the order for, Michaels's termination (JX-71). The concluding paragraph of the DeCamillis email stated:

You have frequently stated your desire to seek revenge against Mr. Phinney, and I must assume such is the motivation for the inaccurate comments in your letter. By forwarding your letter to Mr. Barber, it is apparent you now seek revenge against the company as well. You have made repeated critical attacks against Mr. Barber's incompetence and lack of morality. To now pursue an alliance with him is most disappointing. Regardless, this shall be my final correspondence and I wish you the best of luck in your future endeavors.

Ibid.

According to Complainant, it was difficult for him to obtain unemployment compensation after being fired by Planet Airways, in part because he had not received a letter of termination (Tr. 213). Michaels testified that he eventually obtained unemployment benefits “over Planet’s objection,” and was eventually hired by Customer Transport, a company in Fort Lauderdale (Tr. 213-14). Complainant further testified that he subsequently talked with Don Landry about Customer Transport and Landry, who had by then been rehired by Respondent, quit Planet Airways and joined Michaels at Customer Transport (Tr. 215). However, according to Complainant, after the fourth day of training, Michaels was informed by Customer Transport’s Chief Pilot that the company was letting him go because it had received “bad reports” about him (Tr. 216). The only employment Complainant has obtained since then has been flying special charters on an “as needed” basis for a company called “Classic Design” at \$1,000 per day (Tr. 219).

On cross-examination, Complainant testified that he had been informed by fellow pilot George Wardally that other pilots at Planet Airways were scheduled to fly overtime hours during February 2002 and that Respondent’s failure to schedule him to fly more than six hours that month was in retaliation for his OSHA-related activities (Tr. 226-28). However, a February 2002 “Cockpit Crew Pay Request Form” maintained by Respondent reflected no pilots or other crewmembers worked any overtime hours during that month, and Michaels acknowledged that he had no other evidence to support his contention that other pilots worked overtime in February 2002 (Tr. 237-38, JX-106).

With regard to his prior employment, Complainant testified that he had worked for Fine Air in Peru in 1994-1995 but was fired after he testified in a Peruvian court regarding an incident where he refused his employer’s request to fly an aircraft carrying illegal weapons (Tr. 242-44). Michaels also testified that he was terminated by Amerijet after refusing to fly an aircraft there which he believed was “broken” (Tr. 244-45). According to Michaels, he subsequently received an award of \$500,000 in compensation and legal costs in a lawsuit he brought against Amerijet (Tr. 433-34).

According to Complainant, his participation in the OSHA investigation relating to Don Landry and Eduardo Insua, as well as his refusal to fly Respondent’s aircraft from Elko, Nevada in January 2002 because of a purportedly illegal flight sequence, were contributing factors in his termination from Planet Airways (Tr. 246-48). He reached this conclusion based on the fact that he had “been there since September of 2000 with a very good record, very clean record, and suddenly in nine days I receive[d] three bogus accusations . . .” (Tr. 248).

With respect to his employment record at Planet Airways, Michaels agreed that a February 2, 2001 memorandum from Chief Pilot Jeffrey Sicular to Complainant predated both the OSHA investigation and the Elko incident (Tr. 249-50, JX-5). However, Complainant disputed that the Sicular memorandum reflected any failure on his part to comply with applicable procedures or

FAA regulations, as he stated in his February 11, 2001 reply to the memorandum (Tr. 251, JX-6). Michaels also disputed that Sicular was ever Chief Pilot at Planet Airways (despite his having identified him as such on direct examination), and he testified that Sicular, whom he described as a “rookie captain,” was never his supervisor at Planet Airways (Tr. 253-55). Complainant further testified that Sicular was engaging in “an illegal act of impersonation” by representing himself as Chief Pilot and, when he received Sicular’s memorandum, he called Frank Barber and told him “you have to stop this rookie pilot, Sicular, which is impersonating a chief pilot” (Tr. 256, 258). According to Michaels, Barber told him not to worry because he was taking care of Sicular “now” (Tr. 259). Complainant further testified that he was not aware that the Sicular memorandum was in his personnel file until he reviewed the file in February 2002 with the permission of Carell Rodriguez (Tr. 272).

Michaels also disputed that an April 13, 2001 memorandum in his personnel file, in which DeAnna Desmond reported she had been unable to contact (noted as “UTC”) Complainant to schedule him to pilot a flight that day, reflected a valid report of any performance deficiency (Tr. 273- 74, JX-7). According to Complainant, he had spoken with Desmond earlier and she had approved his request that he be allowed to turn his cellular phone off when he attended church (Tr. 273). Michaels further testified that he complained about the incident to Chief Pilot Gerry Davis who agreed with him that he was not at fault (Tr. 273-74). According to Complainant, he declined Davis’s suggestion that he talk to Frank Barber about the incident and, instead, decided to “just bite the bullet and . . . develop a system that it will not happen to me again” (Tr. 274).

A memorandum from Davis to Michaels dated April 18, 2001 notes that Complainant’s pay for April was to be docked eight and one-half hours for the UTC incident (JX-8). An April 19, 2001 letter to Davis from Complainant states that the decision to dock his pay was “reached in a hurry with out [sic] due process” based on incomplete information (JX-9). A “Pay Deduction” memorandum dated April 20, 2001 reflects the deduction of \$637.50 from Michaels’s pay for the period ending April 20, 2001 due to the UTC incident (JX-10). Complainant testified that he was also unaware that these documents were in his personnel file until he reviewed the file in February 2002 (Tr. 279).

In an April 24, 2001 letter from Michaels to Davis, Complainant alleged that he had not been credited with the proper number of days off (JX-11). The letter stated that: crew members at Planet Airways are entitled to ten days off per month; the schedule for April 2001 showed Michaels as receiving nine days off; and April 13th (the date of the UTC incident) should be considered as “the missing day off” (JX-11). An April 27, 2001 memorandum from Davis responding to Michaels’s letter noted that Davis checked the April schedule and confirmed that Complainant was scheduled “off” for April 4, 5, 9, 10, 11, 12, 16, 17, 23, and 24, *i.e.*, ten days (JX-12). Complainant testified that he believed Davis called DeAnna Desmond after receiving Michaels’s April 24 letter and Desmond thereafter “corrected” the schedule by adding “one more

day off, which . . . which was a way to cover up her mistake” (Tr. 286).⁵ Complainant could not recall whether JX-11 or JX-12 were in his personnel file when he reviewed it in February 2002 (Tr. 286-87). He never took any further action with respect to the matter because “[i]t was no big deal” (Tr. 288).

On August 28, 2001 Frank Barber drafted a certified letter to Complainant in which he recited several violations of company policy (JX-19). According to the letter, Michaels ignored direct instructions given to him by a Planet Airways representative on August 19, 2001 when he took transportation provided by Respondent and left three members of his crew stranded at the Miami International Airport. *Ibid.* The letter further noted that Michaels: (1) failed to respond to a call from Chief Pilot Dick Capon concerning the August 19, 2001 matter until August 23, 2001, and thereafter refused to meet with him concerning the incident until August 29, 2001; (2) cost the company \$1,000 on August 20, 2001 when he departed Fort Lauderdale Airport with inadequate fuel on a flight to Nassau, Bahamas and had to purchase more costly fuel there; (3) rudely interrupted a crew briefing on August 24, 2001 and used profane language when referring to Flight Attendant Monica Campbell in front of her co-workers; and (4) left Campbell stranded at Miami International Airport on August 26, 2001 when he took Planet Airways-provided transportation to Fort Lauderdale. *Ibid.* Barber’s letter concluded by informing Michaels that, due to Complainant’s repeated violations of company policy, he was being suspended “until such time that you present yourself to the Chief Pilot and Director of Operations and explain your behavior.” *Ibid.*

On cross-examination, Complainant testified that he drove to Fort Lauderdale the same day he received Barber’s August 28, 2001 letter (Tr. 289).⁶ He further testified that he spoke with Chief Pilot Dick Capon and Barber about the events described in the letter, and that “they were absolutely satisfied with my explanation and they say this letter never exist.” *Ibid.* He testified: “I answered everything, and they were satisfied, and he destroyed his copy and throw it

⁵ According to Michaels, DeAnna Desmond also testified falsely on behalf of Amerijet in the lawsuit he brought against that carrier (Tr. 433-34).

⁶ Complainant testified that Frank Barber hand-delivered a copy of this letter to him “in the employment office in Miami” (Tr. 295). This is the same letter identified by Michaels on direct examination as the letter Barber gave him when Michaels showed up to testify at Landry’s August 29, 2001 unemployment hearing (Tr. 97). Complainant testified that he was surprised to see Barber at the hearing because the only person he told he would be there was Don Landry (Tr. 310-11). According to Michaels he believed at that time that Barber had treated Landry harshly and unfairly when he disciplined, suspended, and ultimately terminated his employment (Tr. 314-15). Michaels also confirmed that he received a copy of the letter by certified mail several days later, but testified that the matter had been resolved by that time (Tr. 295).

away and told me to destroy my copy and throw it away because this document never exist” (Tr. 295).⁷

According to a “Record of Verbal Warning” form signed by then-Chief Pilot Richard Capon, he and Barber met with Michaels on August 29, 2001, at which time they warned Complainant about his lack of concern for his fellow crew members and “educated” Michaels as to proper fuel-planning procedures designed to avoid higher than necessary fuel costs caused by flying aircraft with an improper fuel load (JX-21). Michaels denied ever having seen the “Record of Verbal Warning,” and he further denied ever being reprimanded or verbally warned about the incidents described in Barber’s August 28th letter (Tr. 301-02). In addition, Complainant reaffirmed his earlier testimony that he had had no problems at Planet Airways until he became involved in the Landry and Insua whistleblower investigations in November 2001, and he repeatedly and adamantly denied that any of the incidents which occurred between February and August 2001 represented deficiencies in his performance (Tr. 303-10).

With regard to his November 12, 2001 “affidavit,” Complainant testified that he gave a copy to Don Landry but not OSHA Investigator Mike Moon (Tr. 316, JX-54). He also testified that he did not give a copy of the affidavit to anyone at Planet Airways, and he had no knowledge of whether Carell Rodriguez, Tony DeCamillis, Jim Phinney, or Joe Gleason knew of, or had seen, the affidavit prior to January 13, 2002 (Tr. 317).

On cross-examination, Complainant was also questioned about the document created by Carell Rodriguez on Michaels’s personal computer when they met December 18, 2001 at Complainant’s home (Tr. 318-19, JX-107). The first question contained in the document asked whether Michaels was aware of any unprofessional or inappropriate behavior exhibited by Respondent’s management personnel which resulted in a hostile work environment (Tr. 319). Complainant’s response to the question identified, among others, Frank Barber as having engaged in unprofessional and inappropriate behavior and gave the following examples of such conduct: the UTC incident which resulted in Complainant’s loss of eight and one-half hours of pay; the suspension of Michaels on August 29, 2001 at Landry’s unemployment hearing; Barber’s treatment of Don Landry during his tenure at Planet Airways; the terminations of Captain Tony Alvarez and Chief Flight Attendant Anna Hosner by Barber; Barber’s ordering of Jeff Sicular to “sign off” on First Officer Pat Davis’s qualifications despite the fact that Davis could not land a Boeing 727 aircraft; Barber’s involvement in getting Diane Halloran, FAA’s Principal Operations Inspector, to suspend the license of pilot Marco Giamellaro; and Barber’s retaliation against various employees for reporting safety violations at Planet Airways (Tr. 319, 321-25).

When questioned about his written complaint to OSHA Investigator Mike Moon, Complainant acknowledged that the complaint described “harassment under the command of the

⁷ Complainant acknowledged that JX-19, which is an unsigned copy of the August 28th suspension letter, appeared to be identical to the signed copy he received from Barber in August 2001 (Tr. 298).

V.P. of Operations Frank Barber since being interviewed by [Moon] on Nov. 28, 2001.” However, Michaels denied that the document indicated he had ever been a victim of harassment by Barber (Tr. 328, JX-65).⁸ Complainant testified that he originally spoke with Moon on November 9, 2001 and prepared an affidavit on November 12, 2001 regarding the OSHA investigation of Landry’s whistleblower complaint (Tr. 329-30, JX-54). He further testified that his own complaint of harassment was given to Moon on January 29, 2002, but he again denied that any of the three documents -- the affidavit prepared by him regarding Don Landry’s OSHA complaint (JX-54), his OSHA complaint (JX-65), or the December 18, 2001 document prepared by Carell Rodriguez at his home (JX-107) -- reflected any harassment or inappropriate behavior by Barber (Tr. 331-32). According to Michaels:

It says by “Planet Airways Flight operations department.” That is my complaint. “Luis Michaels, I have been victim of harassment by Planet Airways flight operations department.”

Now, who commands the flight operations department is Mr. Barber. But, the harassment I receive actually came from Jim Phinney, but I will not say Jim Phinney. I will say Planet Airways flight operations department.

Ibid. Complainant agreed that his OSHA complaint expressly asked that Barber be “reprimanded” since he was the “boss,” but he asserted that he “could not ask OSHA to reprimand every single person that works in the operations department” (Tr. 333-34).

On cross-examination, Complainant also acknowledged that his first contact with OSHA Investigator Mike Moon was on November 9, 2001 (Tr. 334). He further acknowledged that he was terminated from Planet Airways on March 13, 2002 and that nothing of a “retaliatory or harassing” nature was done to him until at least January 14, 2002 (Tr. 335). Complainant believed his termination was retaliatory “because right after January 13 is where everything starts. And after January 13 is when Tina Strauss told me they going to fire you because of this incident of the Customs violation” (Tr. 338-39).

The “Customs violation” referred to by Michaels occurred on December 16, 2001 (Tr. 345, JX-24). The form on which the violation is recorded was signed on December 17, 2001 by Jeffrey N. Sicular, Director of Flight Standards, and stated, in relevant part:

This “Notice of Violation” is a warning only, not a penalty notification. It will serve as a record that you have been *formally notified* that the pilot or other

⁸ During cross-examination, Complainant repeatedly and adamantly testified that he was never harassed or intimidated by Frank Barber during his tenure at Planet Airways. According to Michaels, the only complaint he had with Barber was the UTC incident which resulted in his loss of eight and one-half hours pay (Tr. 415). Michaels admitted, however, that a written statement he gave OSHA on August 6, 2002 noted that “Frank Barber called me at home and tried to intimidate me” (Tr. 416, JX-79).

individual in charge of an aircraft is responsible for insuring that all reporting requirements to U.S. Customs are fulfilled. Requests to FAA and or other agencies does not relieve a pilot of their responsibilities under the law. Attempts to provide proper advance notification to U.S. Customs, indirectly, such as via FAA and or Flight Services, often result in untimely notification to Customs. This could result in a penalty action against the pilot and or persons in charge of the aircraft.

JX-24 (italics and underlining in original).

A memorandum attached to the Notice of Violation form, authored by Jim Phinney and dated December 20, 2001, stated:

As we discussed on the telephone this AM, attached is the violation received by Planet Airways from US Customs. Please relay your version of the events of the evening to my office. Thanks in advance for your assistance.

Ibid. Although Complainant denied ever having received Phinney's memorandum, he acknowledged that he did speak with Phinney on December 20th regarding the incident (Tr. 345-46). According to Michaels, he informed Phinney during their telephone conversation that the aircraft had been precleared by Customs (Tr. 346). Complainant further testified that he thereafter spoke with Tina Strauss, his Senior Flight Attendant:

I said, "Tina, what do you know about these thing that we went through that airplane without preclearance?" And she says, "Don't worry, I already have sent a letter. They were all over me," because she is the one who handles those papers. "And I already told them that I was lied by the agent and I was told we were precleared and I told you that we were precleared, so the issue is going to go away."

(Tr. 348-49). According to Michaels, he believed after his conversation with Strauss that the matter had "gone away" until he received Phinney's January 21, 2002 memorandum in which Phinney stated:

Attached is my correspondence to you requesting a response dated 12/20/02. As of this date I have not received any information from you regarding this situation. A deadline of 17:00 local time on Tuesday, 1/22/01 has been set for your reply. In the absence of your response, a determination will be made as to your culpability at that time. Thank you in advance for your assistance.

(JX-28).⁹

Complainant also testified on cross-examination that he had no direct knowledge regarding whether the owners of Planet Airways -- DeCamillis or Garrambone -- knew of his refusal to fly one its aircraft out of Elko, Nevada in January 2002 because of a purportedly illegal "flight sequence" (Tr. 366). However, Michaels stated he assumed they knew of the incident because Planet Airways lost \$50,000 and he was ultimately fired in retaliation for his refusal to fly the plane (Tr. 366, 369). According to Complainant, the estimated times reflected on the "Flight Crew Sequence" form pertaining to this flight had "no value whatsoever" and were "something that DeAnna Desmond pull out of her head" (Tr. 371, JX-60). When asked whether the flight times shown on the form would violate FAA regulations, Michaels testified:

Well, it will not accumulate more than eight hours here. But I have to go by the computerized flight plan and I have to go by the real schedule. It doesn't count from DeAnna Desmond. It counts from the computer. It takes into consideration the headwinds that I am going to face when I fly.

(Tr. 380).

According to Michaels, the flight reflected in JX-60 was the result of a contract between Planet Airways and another air carrier named "Casino Express" (Tr. 384-85). Complainant testified he did not know why Casino Express entered into the contract with Planet Airways, and he denied that the flight was not completed by Planet Airways because Casino Express fixed its airplane and did not need Respondent to complete the remaining leg of the trip (Tr. 385-86). According to Michaels, Casino Express found another carrier, "something like Patriot or some name that I never saw before," to complete the flight (Tr. 386).

Francis M. Barber, Jr.

Frank Barber testified that he was a pilot with Eastern Airlines for 24 years, that he also worked there in flight operations, and he worked with Rich International and Miami Air International, two charter operations in Miami, Florida (Tr. 437). He commenced his employment with Planet Airways on May 1, 1999, before it received its FAA certification, and he left there February 15, 2002 (Tr. 437-38). Barber testified he was Vice President and Director of Operations and that he helped Respondent get its air carrier certification on January 6, 2000 (Tr. 438-39). He described his duties as:

⁹ Complainant was adamant in his responses to several questions regarding whose responsibility it was to ensure compliance with Customs procedures that it was the Senior Flight Attendant who was responsible for handling the appropriate documentation (Tr. 354-57). He further testified that he believed he was fired on March 13, 2002 because of this incident as Tina Strauss told him he would be (Tr. 363-64).

Basically, you run operations, all facets of it and precertification, I was basically in charge of the certification process for the airline, and it's everything, from hiring the pilots to training the pilots, to setting up all the various facets of the flight operations division, make sure pilots are scheduled, the ground handling is in place. Everything having to do to make sure that airplane is able to move from A to B in a legal manner and also a big part of the job is the primary liaison with the FAA, the Federal Aviation Administration.

(Tr. 439).

Barber did not know Michaels before Complainant was hired as a pilot at Planet Airways, but he supervised Michaels until being fired by Respondent in February 2002 (Tr. 440). He described Complainant as a "very good" and "highly respected" pilot, but someone who had a weakness in "not communicating with his crews as well as he should." *Ibid.* He acknowledged that Michaels was critical of Respondent's management, but further testified that "that's just something that happens in the business" (Tr. 441).

According to Barber, he knew Complainant was a witness in Don Landry's OSHA proceeding, but was "on the fringes of that whole thing" because Planet Airways had cut him out of the loop (Tr. 441). He was also aware of the fact that Michaels had filed his own OSHA complaint in January 2002 because witnesses were meeting with investigators at Respondent's corporate offices (Tr. 442). Barber testified that Carell Rodriguez worked "very closely" with OSHA Investigator Mike Moon, and that Rodriguez was his point of contact at Planet Airways (Tr. 443).

With respect to the February 1, 2002 meeting involving Barber, Phinney, Rodriguez, and Complainant, Barber testified that Phinney had "some issues" relating to Michaels allegedly leaving trash in the cockpit of an aircraft, failing to obtain preclearance from Customs on a flight to Nassau, and having a dispute with Tracey Gold in the Publications Department (Tr. 444-45). According to Barber, Michaels allegedly announced during the meeting that he had filed an OSHA complaint and that he believed the write-ups by Phinney were generated by his filing of that complaint (Tr. 445). Barber further testified that, after discussing the three incidents, everyone was satisfied with Michaels's explanation and decided there was no need to reprimand Complainant or put anything in his file (Tr. 446). However, Barber stated that, after Michaels's departure from the meeting, Rodriguez and Phinney seemed "very upset with Luis, particularly Mr. Rodriguez [who] stated that he was going to get the guy, indicating that he wanted to fire Luis" (Tr. 447). Barber testified "I was a little surprised and shocked at his reaction, considering the way the meeting had gone" (Tr. 448). He also testified that Phinney "kept bringing me issues about Michaels" every few days after the meeting which Barber did not believe were significant (Tr. 449-50).

Barber next discussed the various individuals who were Chief Pilots at Planet Airways during his tenure there. According to Barber, he obtained a “deviation” from FAA to allow Jeff Sicular to serve as Planet Airways’s Chief Pilot (Tr. 453). He testified that:

Sicular was a horrible, horrible chief pilot. He started writing and taking punitive measures against the pilots, writing such nasty letters and pilots were coming to me and complaining that I had to remove him from – I had to pull the deviation back.

(Tr. 453-54). Based on Barber’s investigation of some of the incidents described in the letters Sicular authored, he concluded that Sicular lied about and exaggerated those incidents (Tr. 455). Barber also testified that Chief Pilot Gerry Davis had “an extremely bad temper” and walked off the job after having a dispute with Respondent’s Human Resources Manager (Tr. 457). According to Barber, Dick Capon was “there just a short time” and left Planet Airways to work for the FAA (Tr. 458). Barber testified that, as long as a pilot was doing his job, he would not discipline that pilot for stating that the Chief Pilot was “unqualified, that he was a liar and he had poor management skills” (Tr. 459).

According to Barber, Carell Rodriguez engaged in a pattern of writing employees up on “trumped up charges” to justify firing them (Tr. 459-461). Barber believed that Rodriguez had done that to him, and he has filed his own OSHA complaint since being fired by Planet Airways (Tr. 461). Barber also believed that other former employees of Planet Airways were retaliated against for complaining to OSHA or the FAA, including Michael Bayten, Respondent’s Director of Safety, and Roy Sikes, its Director of Quality Assurance (Tr. 462-63). According to Barber, there was nothing in Michaels’s file, including anything put there by Barber, that would justify reprimanding Complainant or terminating his employment as a pilot for Planet Airways (Tr. 463-67).

On cross-examination, Barber acknowledged that his OSHA complaint against Respondent had been denied based on a finding that his termination was for nondiscriminatory reasons. He testified, however, that Moon “only gave my case a cursory investigation because he was tying it back to another case that I was left out of but was made to take the blame for” (Tr. 473-74).¹⁰

Barber testified that he had no personal knowledge of why Michaels was terminated in March 2002 because he was no longer employed by Planet Airways at that time (Tr. 476). He believed, however, that Phinney was after Michaels because Michaels continually demonstrated a lack of respect for Phinney (Tr. 476-77). Barber also testified that he did not know what Carell Rodriguez “was up to,” but stated “Carell is very treacherous and he – he’s been that way in a number of cases, and whatever he was up to, he was not telling me” (Tr. 478).

¹⁰ The OSHA investigation to which Barber was referring was the Landry and Insua investigation (Tr. 487).

When questioned about his testimony that he removed Jeff Sicular as Chief Pilot, Barber stated that he withdrew his request for a deviation from the FAA because of various complaints about Sicular from Respondent's pilots (Tr. 478-79). He further testified that Diane Halloran of the FAA had nothing to do with that decision, but she subsequently removed Sicular as "check airman" for Planet Airways because he was falsifying training records (Tr. 480).

Donald Joseph Landry, Jr.

Don Landry testified that he graduated from Louisiana State University in 1965 and that he thereafter attended Nova University in 1992 where he majored in advanced family law and mediation (Tr. 491). His first airline job was in 1961 while he was in college, and he worked for, among other air carriers, Eastern Airlines until it went out of business in 1991 (Tr. 491-92). Landry was hired by Planet Airways on September 18, 2000 (Tr. 492-93). His employment there was terminated on September 27, 2001, but he was reinstated February 20, 2002, and he ultimately resigned on April 1, 2002 (Tr. 493).

According to Landry, the first "problem" he had at Planet Airways occurred January 19, 2001 when Mosha Zangeneh, Respondent's Chief of Maintenance, complained about the number of "write ups" filed by Landry regarding problems with Planet Airways airplanes (Tr. 495). Then, according to Landry, around March 17th he complained to the FAA about a maintenance issue concerning a plane Michaels had flown to Cancun because "[i]t seemed to be the atmosphere at Planet [that everyone] was under pressure not to write things up and to cut corners and that's why I was concerned" (Tr. 496-98). Landry identified the FAA employee with whom he spoke at the time as Diane Halloran, and he testified that he had several subsequent conversations with Halloran about "other issues" (Tr. 498-99).

On April 1, 2001, according to Landry, he spoke with DeAnna Desmond in Respondent's scheduling department about an illegal flight sequence that he was scheduled to fly (Tr. 499). He testified that Desmond refused to change the schedule until Frank Barber intervened, and then Michaels and his crew "dead-headed up to Indianapolis to fly the homebound flight back to Fort Lauderdale" after which Landry was suspended for a week (Tr. 500-01). According to Landry, he complained about the incident to Diane Halloran at FAA, and to Gerry Davis who was then Chief Pilot, but he got no response (Tr. 501).

On April 30th, Landry was again written up regarding an incident where he and his crew slept onboard one of Respondent's aircraft after arriving in Nassau at 2:00 a.m. with a return to Miami scheduled for 6:00 a.m. (Tr. 502-03). He was subsequently suspended for 60 days, he testified, because of that incident and because of another maintenance write up he entered in the aircraft's log book regarding a throttle being "out of reg" (Tr. 503).

While he was on suspension, Landry applied for unemployment. Planet Airways contested his application and he subpoenaed five of Respondent's employees to testify on his behalf at an August 29, 2001 hearing (Tr. 510). According to Landry, Planet Airways thereafter sent two of

the witnesses out of town, knowing they were under subpoena, and it threatened two other witnesses with being fired unless they lied at the hearing (Tr. 511). Landry testified that one of the witnesses, a mechanic, told the truth and he “won the hearing . . .” *Ibid.* He also testified that Michaels appeared at the hearing without a subpoena, and they were both surprised that Frank Barber showed up that morning to give Michaels a letter of suspension since the only person other than Michaels and Landry who knew he would be there was a person at the FAA (Tr. 523). Landry believed that someone at the FAA informed Planet Airways about Michaels’s appearance (Tr. 524).

Landry also testified that he received a letter from Frank Barber citing him for “unavailability for a recurrent training” even though he was then on suspension and out of town (Tr. 505). He thereafter arranged to meet with Barber and, during their conversation, Barber made it clear to him that the maintenance department was unhappy with the frequency of his maintenance write ups because, he assumed, it was costing the airline money (Tr. 508-09). Landry testified:

He indicated that the chief of maintenance was unhappy with me because of the logbook write up’s. And if I – you know, if I wanted to maintain my job there I better watch it.

(Tr. 509).

Landry next testified about a telephone call he received from Peter Garrambone and Tony DeCamillis during the evening of September 5, 2001, the same day he met with Barber concerning his suspension (Tr. 511). According to Landry, Garrambone stated that he had heard Landry had spoken with someone from the FAA that morning (Tr. 512). He testified:

And they expressed extreme displeasure with the fact that I had not kept it in house and had been talking to the FAA, and then they suggested that I resign. And I said, “I have no intentions of resigning.”

(Tr. 513). Garrambone and DeCamillis then allegedly asked Landry if he had any problems with Frank Barber and, when he said he did, stated: “Well, can you send me a letter stating your problems with Frank Barber . . .” *Ibid.* Landry testified that he sent a letter to Tony DeCamillis the following day in which he described various problems he had with Frank Barber and offered suggestions on certain changes he believed would be beneficial to Planet Airways. *Ibid.*

Landry stated that on September 12, 2001, he called the Aviation Safety Hotline, which is run by the FAA for pilots to report unsafe conditions (Tr. 514). According to Landry, the person with whom he spoke told him to “put something in writing” and to contact OSHA about the matter. *Ibid.*

Landry's employment at Planet Airways was terminated on September 27, 2001, and on September 28, 2001, he called OSHA and spoke with Mike Moon (Tr. 515). Landry testified that Moon asked him to put his complaint in writing, and he also asked for the names of witnesses who could verify Landry's complaint. *Ibid.* According to Landry, Moon thereafter contacted Michaels and Michaels subsequently gave Moon an affidavit regarding Landry's complaint (Tr. 515-16).

On December 18, 2001, Landry received a telephone call from Michaels and was asked to come to Michaels's home to meet with him and Carell Rodriguez (Tr. 516). Landry had never met Rodriguez since he was hired by Planet Airways after Landry's employment there was terminated (Tr. 517). Landry testified that, after he arrived at Complainant's residence, Rodriguez asked him to talk about his tenure with Planet Airways. *Ibid.* He further testified:

Okay. And he says, "Well," he says, "I was specifically sent from Orlando down to Fort Lauderdale to build a case against Frank Barber and fire Frank Barber." So he says, "Give me anything you can about Frank Barber." So, I gladly did so.

Ibid.

In late January 2002, Landry was asked by Michaels to assist him in drafting his own OSHA complaint (Tr. 525). He did so on or about January 29, 2002 (Tr. 526). Landry also testified that he helped Eduardo Insua, another pilot at Planet Airways, with his OSHA complaint, and that he and Insua were present when Complainant spoke with Tony DeCamillis by telephone the day he was fired (Tr. 520-21). At one point during the conversation, according to Landry, he put his head close to the telephone and heard DeCamillis deny that he had known about Michaels being fired (Tr. 522).

Landry was subsequently reinstated at Planet Airways on February 20, 2002 after entering into a settlement agreement with Respondent regarding his OSHA complaint, but he resigned on April 1, 2002 to accept another job. (Tr. 518). During the time he was back with Planet Airways, however, Landry did not believe that things had changed. He testified, in part:

And I also was hearing the same rumors again, that I wasn't going to pass my check ride no matter how well I did, and so that influenced my decision to take this other job.

Anyway, from my perspective, everything I saw when I worked at Planet Airways is that they are an airline that cuts corners to save money. They knowingly violate the FAR's [Federal Aviation Regulations] and intimidate employees to do the same. The Captains are pressured not to make logbook entries.

They don't want the airplanes out of service. They don't want to pay to fix the airplanes. The crews are pressured to exceed the maximum flight time and duty time limitations, with minimum rest, you know, things of that nature.

And what happens to you, if you – if you bring this to the company's attention that this is wrong, they start papering your file. That's what happened to me. That's what happened to everyone, apparently, that got fired there.

(Tr. 518-19).

When Landry resigned from Planet Airways, he went to work at Custom Air (Tr. 526). He and Michaels were in the same training class until Michaels was fired on the fourth day of class (Tr. 526-27). Landry subsequently spoke with Tom Duckworth, the Director of Operations at Custom Air whom he had known for 30 years, and told Duckworth that "he was making a huge mistake" (Tr. 528). Landry also testified that Frank Barber called Duckworth while Landry was in the office and tried to dissuade him from firing Michaels, but Michaels was terminated anyway (Tr. 528-29).

On cross-examination, Landry denied that the claims in his OSHA complaint were specifically against Frank Barber (Tr. 537). He agreed, however, that his "main complaints at Planet Airways were made against Frank Barber and the [FAA] POI inspector, Diane Halloran" (Tr. 538). He further acknowledged that many of Respondent's employees were interviewed during the OSHA investigation and, although not all of those employees were terminated, he knew of six people who were fired (Tr. 538-39).

Landry also provided additional testimony regarding his telephone conversation with Tony DeCamillis and Peter Garrambone on September 5, 2001 (Tr. 564). Although he initially confirmed his earlier testimony that they were dissatisfied with his having contacted the FAA, and suggested he resign, he then stated:

They didn't say I should [resign]. They asked if I wanted to resign. I mean, they suggested that might be the best course for me and I said I didn't want to resign.

(Tr. 564-65). Landry did not recall if he mentioned the September 5th telephone conversation with DeCamillis and Garrambone in his OSHA complaint, but he was "pretty sure" he did (Tr. 565-68).

When questioned further about the telephone conversation Landry overheard between Michaels and DeCamillis when Landry, Michaels, and Insua were at Insua's house the day Michaels was fired, Landry again testified that he overheard DeCamillis say "no" in response to Michaels question asking whether DeCamillis knew he had been fired (Tr. 569). According to Landry:

Luis asked me and Insua to come over and he put the phone were [sic] you could all listen to it and he asked Mr. DeCamillis if he knew that he had been fired. And so we all heard him say no.

Ibid. Landry acknowledged, however, that a notarized affidavit describing the incident, which was prepared and signed by him on April 6, 2002, did not state he had heard any portion of DeCamillis's part of the conversation (Tr. 571). The affidavit in fact contradicted Landry's testimony and stated, in relevant part:

On the evening of March 13, 2002, at the home of Eduardo Insua and also in Capt. Insua's presence, I, Donald J. Landry, Jr., overheard Capt. Luis Michaels' two telephone conversations with Mr. Tony DeCamillis of Planet Airways. Capt. Michaels originated the first call to Mr. DeCamillis using his cell phone and *while I only heard Capt. Michaels' side of the conversations*, Capt. Michaels related to myself and Capt. Insua Mr. DeCamillis' side immediately after each of the brief conversations were concluded. Apparently, Mr. DeCamillis had just arrived home and told Capt. Michaels he would call back shortly. About fifteen minutes later Mr. DeCamillis called back and after exchanging brief pleasantries, Capt. Michaels asked Mr. DeCamillis if he had knowledge of and/or had ordered his termination of employment by Planet Airways. The tone of the conversation, Capt. Michaels' reactions and his words during the telephone conversation all verified Capt. Michaels' rendition of what Mr. DeCamillis' answer was to these questions; i.e.: that Mr. DeCamillis was surprised to hear that Capt. Michaels had been terminated, that he had no previous knowledge of and had not ordered said termination.

(JX-76) (italics added). A similar affidavit prepared and signed by Eduardo Insua on April 10, 2002 stated, in relevant part:

On the evening of March 13, 2002 while at my home, I overheard Capt. Luis Michaels two telephone conversations with Mr. Tony DeCamillis, President of Planet Airways. . . .

Mr. DeCamillis returned [Michaels's original] call, *I only heard Luis Michael's* [sic] *side of the conversation*,

(JX-77).

Carell Rodriguez

Carell Rodriguez has been Human Resources Manager for Home Depot since December 4, 2002, and he was previously employed by Planet Airways as its Human Resources Manager from August 31, 2001 through August 20, 2002 (Tr. 590). He was responsible for all human resource functions at Planet Airways, including handling workers' compensation matters, employer relations, employee benefits, and responding to legal issues (Tr. 591). Prior to going to work for Respondent, Rodriguez was an "HR generalist" for Ingram Micro, a regional human resources specialist for Health South, and an HR associate for the Florida Golfers Spa. *Ibid.* He

has a Bachelor's degree in human resources and has completed 30 percent of the requirements for a Master's in HR (Tr. 592).

Rodriguez testified that, when he first went to work for Planet Airways, it had an existing employee handbook which contained various policies and procedures prohibiting retaliation against, and harassment of, employees. *Ibid.* He further testified that Respondent had adopted various policies and procedures regarding the proper operation of the airline to comport with safety regulations of the FAA (Tr. 592-93).

According to Rodriguez, Planet Airways did not have an HR "presence" in its Fort Lauderdale office until he was hired. *Ibid.* During the five-month period that his employment at Planet Airways overlapped with the term of Complainant's employment, Rodriguez became very familiar with Michaels's employment history, both because he was the Custodian of Respondent's personnel records and because he and Michaels "spoke on many occasions" about his employment history (Tr. 593-94). He testified that the first time he looked at Complainant's file was "probably right before the year ended in December, because of some situation he had with Customs" (Tr. 594-95). He further testified that Frank Barber made him "aware on several occasions that there were issues with Luis" (Tr. 596). Michaels also came to him regarding issues he had with Barber and, according to Rodriguez, "I tended to side more on Luis's side than anybody else's." *Ibid.* He further stated that he was not particularly liked by management when he first started working at Planet Airways and was "accused of being the union representative for the company" *Ibid.* However, he also testified that he received a lot of support from DeCamillis and Garrambone because they wanted a strong human resources presence in the Fort Lauderdale office (Tr. 598). Rodriguez denied that either DeCamillis or Garrambone indicated to him he was being hired to terminate a particular individual. *Ibid.*

Rodriguez testified that Frank Barber was terminated because he engaged in various inappropriate activities, including wrongfully retaliating against employees, sexually harassing female employees, and engaging in conduct which was not consistent with the values of the organization (Tr. 601). He testified that, when he first joined Planet Airways, there were ongoing OSHA investigations relating to complaints filed by Donald Landry, Eduardo Insua, James Nelson, and Marcos Ruiz (Tr. 602). Rodriguez interacted regularly with OSHA Investigator Moon and made arrangements for him to interview between 20 and 25 witnesses and review documents in a private room (Tr. 602-03). Moon interviewed witnesses more than one time between November and January, and another OSHA Investigator named Ray Lewis participated in the investigations in March (Tr. 603). According to Rodriguez, Landry and Insua believed that they were wrongfully retaliated against by Frank Barber, and Moon confirmed to him that OSHA was likely to rule in their favor against Planet Airways (Tr. 604-05). Moon further informed Rodriguez that the complaints filed by Ruiz and Nelson would be dismissed (Tr. 605). As a result of the OSHA investigation, Rodriguez conducted an internal investigation against Barber, after which both Landry and Insua were reinstated and paid somewhere between \$50,000 and \$100,000. *Ibid.*

At the time he initiated his internal investigation, Rodriguez made sure that Barber's authority to make employment-related decisions was suspended, and he began meeting with employees to gather information (Tr. 606). He met with Michaels at his home because he didn't want anyone to see Complainant in his office and was aware at that time that Complainant had participated in Moon's investigation of the Landry and Insua complaints. *Ibid* Rodriguez's meeting with Michaels occurred on December 18, 2001, and he recorded the questions he asked and the response he received from Michaels at that time (Tr. 607-08, JX-107). The only person about whom Michaels ever complained during conversations both before and at the December 18th meeting was Barber (Tr. 608). While at Michaels's home that day, Complainant gave Rodriguez a copy of the affidavit he prepared on behalf of Landry regarding OSHA's investigation of his complaint (Tr. 609, JX-54).

After the meeting at Michaels's home, Rodriguez arranged a meeting with Barber, Phinney, and Michaels to discuss the Customs clearance issue (Tr. 610). Rodriguez knew that Barber wanted to terminate Complainant's employment, and told him "[N]o, we're not going to do that. What we're going to do is, we're going to have a meeting and find out his side of the story, give him his day in court." *Ibid*. According to Rodriguez, the meeting lasted about two and one-half hours and resulted in a determination that no formal corrective action was necessary as Rodriguez recorded in a handwritten note dated February 1, 2002 (Tr. 612, JX-33). The meeting was recorded by Michaels (Tr. 622, JX-33).

Three days after the meeting to discuss the Customs clearance violation, Phinney hand-delivered a letter to Michaels concerning the incident in which Complainant was informed that further similar occurrences could lead to corrective action being taken by Planet Airways, up to and including termination (Tr. 615, JX-34). Phinney had been hesitant about writing the letter, but Barber wanted him to draft it (Tr. 616). According to Rodriguez, the day after Barber was terminated (on February 15, 2002), Rodriguez and Phinney met and decided to pull the letter from Michaels's file because:

I knew that there was a history between Frank Barber and Mr. Michaels and I knew that Mr. Barber wasn't doing the right thing – in other words, I felt that, you know, Mr. Michaels is in a disadvantaged position, and had a lot of issues with the company.

(Tr. 614).

When asked again about the February 1, 2002 meeting involving Barber, Phinney, Rodriguez, and Michaels, Rodriguez acknowledged that they also discussed Phinney's memoranda to Michaels about leaving charts in his aircraft (Tr. 618-21, JX-27, JX-30). According to Rodriguez, they agreed during the meeting that this issue was "dismissed" as reflected by the handwritten notation on the January 28, 2002 memorandum from Phinney to Michaels (Tr. 621, JX-30). The parties also discussed an issue regarding Tracey Gold and

Technical Publications but, according to Rodriguez, Michaels never received any disciplinary notice as a result of the incident (Tr. 623, JX-26, JX-31). Rodriguez testified:

When I left that meeting, I felt comfortable that at least myself and Mr. Phinney were on the same page, all in agreement. With Mr. Michaels I felt comfortable that we were going to see less of a combative Mr. Michaels, more of a – a more fluid person, somebody who is more willing to be part of a team, somebody who is going to be a better associate[] for Planet Airways.

That didn't happen. I think he became a little bit more combative.

....

What I mean by combative is somebody who is not willing to accept his own – his or her own shortcomings, somebody who is not willing to take a look at what he or she did wrong and admit, okay, I made a mistake. It's okay. Let's move on. I won't do it again.

(Tr. 625-26). On February 2, 2002, the day following their meeting, Rodriguez received a copy of an email sent by Michaels to Phinney which disappointed Rodriguez because he interpreted its contents as evidence that Michaels felt “he had zero culpability and that he was right and everyone else was wrong” (Tr. 627, JX-31).

Rodriguez also testified that Michaels informed everyone present at the February 1st meeting that he had filed his own OSHA complaint sometime in January (Tr. 629). On February 16, 2002, the day after Barber was fired by Planet Airways, Michaels spoke to Rodriguez to thank him for terminating Barber, and Michaels volunteered at that time to withdraw his OSHA complaint (Tr. 632-33). As a result of this conversation, Rodriguez wrote on JX-34, the February 4, 2002 letter to Michaels concerning the Customs clearance issue:

On 2/16/02 Jim Phinney and I discussed this action in detail. After much consideration, we decided to reduce this action to a coaching session (– no written warning.)

(Tr. 633, JX-34). He also wrote “VOID” at the top of the letter indicating that it was “no longer a valid document. In other words, it doesn't exist.” (Tr. 633-34). When asked why it remained in Michaels's personnel file thereafter, Rodriguez testified that it was his practice to never remove documents from a personnel file unless the matter was “expunged by a court order” (Tr. 634). That way, he stated, the file reflected an accurate record of what happened and demonstrated what actions the employer took in attempting to remedy the situation. *Ibid.*

Sometime after their February 16th meeting, Michaels asked to review his personnel file (Tr. 635). When he did so, he became angry because the February 2nd letter reprimanding him for the Customs clearance issue, as well as other items, were still in his file, and he requested a meeting with Phinney and Rodriguez (Tr. 636, JX-34). The three of them met again on March 6, 2002, at which time Michaels reviewed his personnel file again (Tr. 637). Rodriguez testified:

He took his personnel file once again and began reviewing his personnel file and then called for the meeting. He immediately reviewed the personnel file for approximately half an hour, and called for the meeting.

And then both myself and Mr. Phinney went into the conference [room] where he was reviewing his personnel file, at which point Mr. Michaels's combative personality came out, I think [he] just spoke worse like I had never seen him before.

And I was aware that this – this individual was somebody – I have a difficult time explaining. Very – he's a very passionate man. He's a very passionate person. He's a very strong-willed, strong-minded person, sometimes to the point where he's difficult to comprehend.

At this meeting, he did some very passionate things, in that he read from a prepared statement, demanding that the chief pilot resign. Basically I think Mr. Michaels – I'm not going to say lost his mind. That's inappropriate, but something was not right. Something clicked when he reviewed his personnel file.

Ibid. Rodriguez, who had previously taught classes on work place violence, believed that Michaels was exhibiting behavioral indicators of violence during the meeting (Tr. 641). He testified that

[H]is voice was abnormally loud. His message was unclear, mixed, did not make sense. Very strange. His arms pounded against the table. His eyebrows moved closer [together]. I mean, his face – his facial expression changed. It was an aggressive Mr. Michaels.

(Tr. 641-42).

After the March 6th meeting, Rodriguez drafted a handwritten synopsis of the meeting (Tr. 642, JX-39). He further testified that. A few days later, he received a letter from Phinney in which Phinney expressed concern about Michaels's behavior (Tr. 643). The letter was dated March 11, 2002 and stated, in part:

At this time I would like to request consul [sic] from the company in regards Captain Michaels. While I do not feel it is unusual for employees and management to have differences, I am alerted in this instance to the personal nature of Captain Michael's [sic] attacks as well as the intensity of his emotions and his apparent inability to control them. I would like to reference the Air Cal incident where a disgruntled company employee killed a flight crew and crashed a BAE-146, full of passengers, in retribution for a perceived injustice. Also, lets remember a Fed-Ex pilot attacked his crewmates and attempted to crash the aircraft into the Memphis Hub after he felt the company unfairly treated him. Caution in regards to Captain Michael's [sic] intentions may be in order.

(JX-37).

Rodriguez also received a memorandum dated March 11, 2002 from DeAnna Desmond in Crew Scheduling in which she described two telephone conversations with Michaels (Tr. 643, JX-38). During the second conversations, according to Desmond's memorandum, Michaels said he was calling to let her know he was not upset. The memorandum went on to note:

I told him to talk to Jim Phinney in the morning and he said he would not deal with Jim Phinney. He told me that he was dealing with Tony DeCamillis. He said, "Jim Phinney is my enemy," and that, "Jim Phinney f---ed me and I am going to f--- Jim Phinney." It concerns me that a Crewmember would make such a strong, threatening statement towards the Chief Pilot. . . .

(JX-38). Rodriguez testified that, when he read Desmond's memorandum, he became even more concerned about Michaels's behavior (Tr. 644).¹¹

Dean Chapman, Planet Airways's Chief Dispatcher, also sent Rodriguez a memorandum dated March 11, 2002 in which he stated he was with DeAnna Desmond the day before when she received the second call from Michaels (JX-41). The memorandum noted that she was visibly distressed as a result of having spoken with Michaels on the afternoon of March 10th. Rodriguez had spoken with Chapman after being informed by Desmond that they were together at the time she spoke with Michaels, and he asked Chapman to document the incident (Tr. 645).

Around this same time, Rodriguez was visited by Dean Birmingham, another of Planet Airways's pilots, who wanted to speak with him about Michaels (Tr. 646-47). Rodriguez testified:

He made reference to Mr. Michaels being in an odd, in an irregular, in an abnormal emotional state, making comments that did not really make sense, but what did make sense were [sic] that these comments were threatening, threatening to Mr. Phinney, and he was overall concerned.

(Tr. 647). After his meeting with Birmingham, Rodriguez drafted a handwritten memorandum dated March 11, 2002 in which he recounted Birmingham's conversation with Michaels (Tr. 646, JX-40). According to the memorandum, Birmingham had been approached by Michaels in the crew lounge approximately three days earlier and began complaining angrily about Phinney being unqualified as Chief Pilot. Rodriguez wrote, in part:

¹¹ Rodriguez also testified that sometime after the March 6th meeting Michaels had left a message on his answering machine saying he had "ammunition" which he was going to use against Phinney (Tr. 644). He was not sure exactly what Michaels meant by "ammunition" but, with everything else that had happened, was worried because Michaels "was acting very odd." *Ibid.*

Dean is very concerned about Luis and his behavior. Dean was especially concerned about the way Luis spoke (the tone) and how agitated he was; and the way he gestured with his arms and hands: (waving them) and exhibiting movement as if he was angry, agitated, frustrated.

(JX-40).

As a result of the various incidents involving Michaels, beginning with his conduct at the March 6th meeting, Rodriguez sent a facsimile message to Tony DeCamillis on March 11, 2002 (JX-36). He attached to the message the above-described letters and memoranda and recommended to DeCamillis that Michaels's employment at Planet Airways be terminated (Tr. 647-48). Rodriguez was informed that his recommendation had been approved during a telephone conversation with DeCamillis and Garrambone (Tr. 649). During the conversation, Rodriguez warned DeCamillis and Garrambone that there was a potential risk in terminating Michaels because of his "prior history" with Barber and because Michaels had already filed a whistleblower complaint. *Ibid.* Rodriguez further stated, however, that he believed there was a greater risk to the company in allowing Michaels to continue working based on his recent conduct. *Ibid.* According to Rodriguez, there was no discussion during the conversation about the January 2002 "flight sequencing issue," the Customs clearance issue, the cockpit cleanliness issue, or the technical publications issue, and Michaels's OSHA complaint was discussed only as a reason not to terminate Michaels (Tr. 649-50). Despite the risk to Planet Airways of having to defend itself against another whistleblower complaint, the decision was made to terminate Michaels (Tr. 650, JX-43).

Rodriguez testified that he was not aware that Michaels had contended he was being subjected to retaliation by not being scheduled to fly in February 2002 (Tr. 654). He further testified that business in the airline industry had been very slow since September 11, 2001, and Planet Airways had not been flying any of its crew members over 60 hours a month from that date through February 2002 (Tr. 655-56).

When asked whether he bore any personal animosity towards Michaels, Rodriguez testified:

No. On the contrary, I would say.

....

What I mean by that is that Mr. Michaels is somebody who I felt was not treated appropriately by Mr. Frank Berger [sic]. That when I first walked into Planet Airways he had bona fide complaints regarding Mr. Frank Barber.

I mean, I was – one of the reasons that we terminated Frank Barber was because Mr. Frank Barber suspended Mr. Michaels at an unemployment hearing that Mr. Michaels attended to testify on behalf of Mr. Donald Landry, and these things were very wrong.

So, Mr. Michaels, if anything, I overprotected. I took him under my wing and I didn't allow Mr. Frank Barber to terminate his employment. I didn't allow Frank Barber to do certain things with Mr. Michaels that he wanted to do.

(Tr. 656-57).

Rodriguez was also asked about an investigation of Barber he conducted at the request of Planet Airways (Tr. 658). According to Rodriguez, he drafted a December 12, 2001 letter to Peter Garrambone, Respondent's Chief Executive Officer, in which he recommended that Barber's employment be terminated for a variety of reasons (Tr. 661-62, RX-110). The concluding paragraph of the letter summarizes the conduct justifying termination as follows:

Mr. Barber's employment history is tainted with examples of sexual harassment; creating a hostile work environment; creating an intimidating work environment; establishing a compromising relationship with the FAA [with respect to FAA POI Diane Halloran]; wrongfully demoting, suspending, and terminating employees; retaliating against employees for expressing their safety concerns; exhibiting behavior contrary to Planet Airways' values; and overall substandard management.

...

(RX-110).

On cross-examination, Rodriguez testified that, as Respondent's Human Resources Manager, he reported to DeCamillis and Garrambone, the owners of the company (Tr. 668-69). He denied that Garrambone and DeCamillis could accurately be described as "stock traders" and testified that Garrambone had been involved with aviation since the 1970's and DeCamillis had been VP of Finance for a company named Transcontinental before starting Planet Airways (Tr. 669-70, 680).¹²

Prior to the time Rodriguez joined Planet Airways, Paula Murphy was responsible for HR functions and worked at Respondent's corporate headquarters in Orlando, Florida (Tr. 672). One of the first things Rodriguez did when he was hired was retrieve all employee files from Orlando and move them to his office in Fort Lauderdale. *Ibid.* After retrieving the files, Rodriguez began reviewing them based in part on whether there were pending issues involving a particular employee which needed his attention (Tr. 673). Two of the first files he looked at were the files of Landry and Insua because of the ongoing OSHA investigation (Tr. 674-75). Neither Garrambone nor DeCamillis told him to look at Landry's and Insua's files, nor did they tell him that they wanted to find a way to get rid of Frank Barber (Tr. 675-76). He did, however, meet

¹² Transcontinental is owned by Lou Pearlman, who is also part owner of Planet Airways, and is a business which is involved in, among other things, promoting rock bands (Tr. 678-79). It is not an airline company. *Ibid.*

with them shortly after having been notified by OSHA of its investigation, and Rodriguez informed them at that time that Barber was the central figure in the OSHA matter (Tr. 676-77).

Within five weeks of when Rodriguez went to work at Planet Airways, he was instructed to return all executive personnel files to Orlando (Tr. 677). He did not recall whether he reviewed Barber's file before sending the files back to Orlando, but Rodriguez believed that he had decided Barber should be terminated by the time he had been at Planet Airways for six weeks (Tr. 678, 680). He started his employment there on October 30, 2001, received notification of an on-site investigation by OSHA in early November, and had been visited by at least 20 employees within three weeks of being hired, all of whom expressed concern about Barber's conduct (Tr. 681-82). Employees with whom he spoke about Barber included, among others, Luis Michaels, Tracey Sheridan, Tracey Gold, Patty Smith, Tim Holt, Michael Hacker, Dean Chapman, Ron Rooks, and George Rodali (Tr. 682).

Rodriguez further testified that there had been "some type of a meeting, or some type of a communication" between him and Mr. Michaels before they met at Michaels's residence on December 18, 2001 (Tr. 682-83). He did not recall who initiated the contact and agreed that he may have solicited Michaels's input because he knew Michaels was "friendly with Don Landry and that he might be willing to help" (Tr. 685-86). He denied, however, that Michaels was "skeptical" of him when they met, or that he knew before the meeting that Michaels was going to call Landry (Tr. 686). According to Rodriguez, he did not believe it would be helpful to have Landry at the meeting since he had already been fired by Planet Airways, but Michaels persisted and ultimately called Landry to request that he come over (Tr. 687). Rodriguez further denied telling Michaels or Landry at the meeting that he had been hired by Planet Airways to fire Frank Barter (Tr. 689-90, 695). He did not recall how it was that he came to use Michaels's computer to prepare Complainant's written statement but testified that he prepared the statement and Michaels signed it after printing it out (Tr. 696). Rodriguez could not recall whether Michaels kept a copy of the statement, but he acknowledged that he gave a copy to Garrambone and DeCamillis (Tr. 697). Michaels' statement was the only one obtained by Rodriguez in the evening at an employee's home (Tr. 703-04).

At the time that Rodriguez met with Phinney, Barber, and Michaels on February 1, 2002, Rodriguez had already recommended that Barber be terminated but Barber was not yet aware of that recommendation (Tr. 704). Barber was included as a participant in the meeting because he was still Director of Operations and would have to be consulted about matters affecting employees under his command (Tr. 705-06). After Michaels departed the meeting, Phinney, Barber and Rodriguez remained to discuss Michaels's situation (Tr. 708). Rodriguez denied that either he or Phinney told Barber at that time that they wanted to fire Michaels (Tr. 708-09).¹³ Rodriguez also testified that no corrective action was taken against Michaels because of the Tracey Gold incident, the Customs clearance incident, or the "garbage-in-the-cockpit" incident,

¹³ Rodriguez also denied that he or Phinney talked to Barber about terminating Michaels between February 2nd and February 15th when Barber was fired (Tr. 723).

despite the fact that such conduct would normally result in corrective action, because Rodriguez believed they resulted from Barber's attempts to retaliate against Michaels for assisting Landry with his OSHA complaint (Tr. 709-10). It was Barber, according to Rodriguez, who came to him on several occasions and wanted Michaels fired (Tr. 724). Because he had no intention of allowing Barber to terminate Michaels, he never suggested to Barber that he document his complaints concerning Michaels or follow the procedures for disciplining employees outlined in the supervisor's handbook (Tr. 725).

Anthony DeCamillis

Anthony DeCamillis has been President of Planet Airways since the company's inception in 1995 and is responsible for all facets of the company's operations (Tr. 746-47). Planet Airways received its FAA certification in January 2000 and presently operates six aircraft (Tr. 748).

According to DeCamillis, during the time that Michaels was employed by Planet Airways, the company had policies and procedures in place to prevent retaliation against employees who reported safety violations to the FAA (Tr. 748-49). DeCamillis had little contact with Michaels until shortly before he was fired since Michaels worked out of Fort Lauderdale and DeCamillis worked out of Respondent's corporate office in Orlando (Tr. 750).

DeCamillis testified that he was aware of an allegation that Michaels left his crew stranded on one occasion, as well as allegations of aggressive behavior and borderline insubordination (Tr. 751). Michaels's immediate supervisor was the Chief Pilot, and it was the Chief Pilot's responsibility to deal with such matters (Tr. 751-52). DeCamillis stated he was not aware Michaels had alleged Planet Airways lost a contract with Casino Express in January 2002 (Tr. 772-73). According to DeCamillis, Planet Airways did not lose a contract with Casino Express and it never lost \$50,000 as a result of anything done by Michaels (Tr. 773).

DeCamillis became directly involved in issues relating to Michaels when Michaels asked to meet with him in late February or early March 2002 (Tr. 752). According to DeCamillis, Michaels complained that he was being treated unfairly by Chief Pilot Jim Phinney (Tr. 752-53). Michaels also complained that Phinney was not qualified to be Chief Pilot and threatened to "voice his safety concerns . . . to Washington" if Phinney was not removed from that position (Tr. 753). Michaels had prepared an outline of points he wanted to discuss with DeCamillis during their meeting and gave a copy of the outline to DeCamillis (Tr. 754, JX-64). One of the points listed in the outline, and discussed during the meeting, was Michaels's belief that the Chief Pilot should always contact a pilot first before ever taking any adverse action against him. DeCamillis disagreed with Michaels's position because operating the company in such a manner would be contrary to airline safety, and Michaels's attempts to get Phinney fired were both inappropriate and ineffective since it was the company's policy that all safety concerns be reported to the proper authorities regardless of who or what they involved (Tr. 755-56). DeCamillis's meeting with Michaels confirmed some of the reports he had heard before the meeting concerning Michaels's behavior (Tr. 756). He told Michaels at the conclusion of the meeting that he would contact him

the following week for a follow-up meeting once he had looked into the issues raised by Michaels (Tr. 757).

Prior to their next meeting, DeCamillis was informed by Carell Rodriguez that Michaels had made various threatening remarks regarding Phinney (Tr. 757-58). On March 13, 2002, after receiving a facsimile message and supporting documents from Rodriguez which stated that Michaels was “perceived to be a potential safety/work place violence risk,” DeCamillis and Peter Garrambone decided that Michaels should be fired (Tr. 758, JX-36). Sometime that same day, during the late afternoon or early evening, DeCamillis received a telephone call from Michaels (Tr. 759). DeCamillis had just returned home and told Michaels he would have to call him back after talking to the company’s attorneys (Tr. 760). He did not, as Michaels subsequently wrote to Carell Rodriguez in a March 15, 2002 email, deny any knowledge of Michaels’s termination or deny having given the order to do so, and he sent Michaels and Rodriguez an email in which he disputed the accuracy of Michaels’s description of their conversation (Tr. 761-62, JX-70, JX-71). DeCamillis received one further email from Michaels repeating his allegations, but DeCamillis had no further contact with him (Tr. 762-63, JX-72).

DeCamillis testified that neither he nor anyone else at the company took any action to prevent Michaels from obtaining employment after he was fired by Planet Airways (Tr. 763). He further testified that Michaels was fired as a result of the matters described in the facsimile message sent to him by Carell Rodriguez on March 13, 2002 and for no other reason (Tr. 765, JX-36).

DeCamillis stated that he knew Don Landry and was aware of the OSHA investigation initiated by his complaint (Tr. 766). According to DeCamillis, he met with the OSHA investigator involved in the Landry investigation and was informed that Respondent’s Director of Operations (Frank Barber) was working with an FAA inspector (Diane Halloran) who notified him whenever a Planet Airways employee reported a safety concern to FAA and Barber would thereafter retaliate against that employee. *Ibid.* As a result of his meeting with the OSHA inspector, DeCamillis initiated an internal investigation which confirmed the allegations and led to the termination of Barber’s employment (Tr. 768). DeCamillis further testified that Barber subsequently filed his own whistleblower complaint, which was denied, that Barber subsequently contacted Respondent’s vendors and customers to report “safety concerns,” and that he has taken other actions against the interests of Planet Airways as a result of being fired. *Ibid.*

According to DeCamillis, Planet Airways has never been assessed a civil or administrative penalty for violating safety regulations (Tr. 769). He testified that FAA conducted a series of three investigations over a seven month period following Barber’s termination and the final report of that investigations noted 22 “findings” of which eight were “mitigated” resulting in “zero enforcement action” (Tr. 770-71).

On cross-examination, DeCamillis testified that he was not a pilot, that he had been an investment banker before working for Planet Airways, and that he had no prior experience in the

aviation industry (Tr. 774). DeCamillis testified that Planet Airways was a privately-held company and he has been against taking the company public from the outset, although his partner, Peter Garrambone, would like to do so (Tr. 775). Planet Airways earned approximately \$2 million during 2000, its first year of operations. *Ibid.* The company lost approximately \$4 million in 2001 (Tr. 776).

According to DeCamillis, he considered OSHA and FAA violations to be extremely important matters (Tr. 777). Carell Rodriguez was the company's principal liaison with OSHA and either Respondent's Director of Operations or Director of Maintenance interacted with FAA (Tr. 777-78). DeCamillis was aware of Michaels's OSHA complaint at some point before he was fired, and was also aware that Landry had filed a whistleblower complaint, but he did not recall whether Landry went to OSHA or the FAA (Tr. 778, 783). DeCamillis denied that he or Peter Garrambone called Landry after hearing he had gone to the FAA to suggest he resign (Tr. 785). He acknowledged, however, that Landry arranged a meeting at some point to discuss Barber's mistreatment of Landry, and Garrambone may have suggested at that time that Landry resign (Tr. 785). DeCamillis denied that he ever told Landry to keep safety problems "in house" (Tr. 785-86). He further denied that he ever talked to Michaels about "keeping the dirty laundry in house" (Tr. 787-88).

DeCamillis also testified on cross-examination that he was familiar with the Supervisory Handbook which was in place at the time Michaels was fired (Tr. 790). Although he agreed it was Respondent's general practice to impose less harsh disciplinary measures on employees for their first infractions, followed by progressively more severe measures where required, DeCamillis believed Respondent's actions against Michaels were appropriate under the circumstances (Tr. 791-92). He was aware of an incident involving a Planet Airways pilot who had been seen drinking before a scheduled flight but did not recall exactly what disciplinary action was taken with respect to that incident (Tr. 793).

James Hart Phinney

James Phinney became Respondent's Chief Pilot in February 2002 (Tr. 794). He was originally hired by Planet Airways in August 2001 and was Director of Training before being made Chief Pilot (Tr. 795). Prior to his employment with Planet Airways, Phinney was General Manager and Director of Flight Operations for Lake Airways, an "international scheduled operator" that served fourteen cities using Boeing 727 aircraft (Tr. 796). He worked at Lake Airways for seven years and was also Chief Pilot and a "check airman" during his tenure there. *Ibid.* Phinney was Chief Pilot for a charter company named "Air Flight," where he worked for 12 years, and he also worked for Eastern Airlines as a First Officer and Flight Engineer before it went out of business (Tr. 796-97).

According to Phinney, he was aware of significant performance problems involving Michaels which began in December 2001 (Tr. 797, JX-55). He spoke to Michaels by telephone around then about an alleged Customs violation and asked Michaels to submit a written

explanation of the incident (Tr. 798, JX-24). When he had received nothing after thirty days, Phinney sent Michaels a memorandum dated January 21, 2002 requesting a response by 5:00 p.m. the next day (Tr. 800, JX-28). Michaels responded by email on January 22nd that he had never received Phinney's earlier request for a written explanation of the Customs incident (Tr. 801, JX-29).

Phinney believed he and Michaels had reached an "impasse" and requested that Carell Rodriguez and Frank Barber become involved (Tr. 804-05). Phinney, Barber, and Rodriguez met with Michaels on February 1, 2002, and Barber subsequently told Phinney to draft a letter of reprimand because of Michaels's continuing failure to accept responsibility for his conduct (Tr. 806, JX-34). On February 16, 2002, Phinney met with Rodriguez, at which time they agreed to "void" the letter of reprimand and treat the matter as a "coaching session" (Tr. 808). Phinney took his copy of the letter and, in Michaels's presence, threw it in a trash receptacle (Tr. 810). He believed that Michaels may have mistakenly believed that the letter which was disposed of came from Michaels's own personnel file. *Ibid.*

Phinney testified that he, Rodriguez, and Barber "dismissed" the incident involving Michaels leaving charts in an aircraft cockpit after Michaels provided a satisfactory explanation of the facts surrounding the incident (Tr. 811-14, JX-27). Phinney did not believe the chart incident was a "serious" matter (Tr. 814). He further testified that he, Barber, and Rodriguez talked briefly after Michaels left the meeting and that they were cautiously optimistic that some progress had been achieved regarding Michaels's conduct (Tr. 820-21). Phinney denied that either he or Rodriguez stated after the meeting that they wanted to "get rid of Mr. Michaels" (Tr. 821).

With respect to Michaels's dispute with Tracey Gold, Phinney testified that he drafted a memorandum and had at least two conversations with Michaels concerning the incident (Tr. 815-16, JX-26). Phinney stated that Michaels responded to his memorandum in an email stating he assumed the matter was resolved since he had seen Phinney shortly after the incident and, after recounting what happened, Phinney, Michaels, and another Planet Airways employee had "laughed about [his] explanation of this encounter" (JX-31). Phinney further testified that he had indeed laughed when Michaels described the incident but that his view of the encounter changed shortly thereafter when he spoke to Gold about her encounter with Michaels (Tr. 817). According to Phinney:

Well, it was very unpleasant. Tracey Gold is a young girl who works in the technical publications department, not by any stretch of the imagination the most exciting part of the airline. It's a bit like a library.

And she's physically challenged. In any event, she loves airplanes. Kids like horses, you know, sailboats. She likes airplanes. She's got a little airplane sitting in the back.

In any event, this really hurt her feelings. She thought that her work was valuable. She thought it was appreciated and it was explained to her in the most

direct manner by [Michaels] that it didn't mean anything to him. It wasn't worth his time of day.

(Tr. 817-18). Phinney further explained that Gold was correct in requesting that Michaels insert his name on the first page of his manual, despite the fact that his name appeared on the outside of the manual, inasmuch as FAA regulations required that the name of the manual's owner be inserted on the first page after "Issued to" (Tr. 818-19).

Phinney also testified that he recalled a meeting with Michaels and Rodriguez in the conference room at Planet Airways during which Michaels was very agitated and upset after having reviewed his personnel file (Tr. 822). According to Phinney, Michaels stated that he was very unhappy with Phinney's performance, he did not believe Phinney was qualified or competent to be Chief Pilot, and he thought Phinney was a liar. *Ibid.* Phinney testified:

He became more and more angry almost. His voice got very loud. His conversation drifted in and out of – I couldn't follow him, quite frankly. I didn't quite know where he was going with this, and he pounded the desk a few times and raised out of his chair.

The end result was after a – quite a long period of time he raised his hand and it's my recollection he said, "So now I think you can understand as clearly as I why I must demand your immediate resignation or I'm going to expose you to the FAA and to Washington."

(Tr. 822-23). According to Phinney, Michaels further stated that the Chief Pilot "should be an advocate for the pilots and the captains especially and should always stick up for them, should always take their side" (Tr. 823). When asked whether he had ever been threatened by Michaels, Phinney testified that he felt "uncomfortable" after their meeting in the conference room and he became increasingly alarmed after being informed by several people that Michaels was making increasingly escalating threats against Phinney (Tr. 825).

Phinney next recounted several conversations he had with Michaels concerning a purportedly "illegal" flight sequence in January 2002 (Tr. 825-26). He testified that Planet Airways became involved in an "ad hoc" trip when an airplane operated by Casino Express became disabled leaving its passengers stranded in Texas (Tr. 826-27, JX-60). The "main" part of the trip involved transporting Casino Express's passengers from Texas to Nevada on January 14, 2002 and, in the event its aircraft was not repaired, completion of the trip the following day (Tr. 828-29). Phinney believed Planet Airways lost about \$2,000 as a result of Michaels flying Respondent's aircraft back to Fort Lauderdale empty either because Casino Express fixed its aircraft or got another carrier to fly the last leg of the trip (Tr. 832). He denied that anyone at Planet Airways retaliated against Michaels because of this incident or that Michaels flew an illegal flight sequence (Tr. 832-33).

According to Phinney, no pilot at Planet Airways flew any overtime hours during the month of February 2002 (Tr. 834). The average number of hours flown by pilots that month was about 20 and Phinney flew 24 hours during February. *Ibid.* Pilots are guaranteed 60 hours of flight pay per month, whether they fly that amount of time or not, and Michaels's pay was no less than that received by Respondent's other pilots for February (Tr. 835).

Phinney stated that he recommended to Carell Rodriguez that Michaels's employment with Planet Airways be terminated (Tr. 836). He also testified that he has never seen another pilot react the way that Michaels reacted after reviewing his personnel file in the conference room, nor has he seen another pilot treat an employee the way Michaels treated Tracey Gold (Tr. 840).

On cross-examination, Phinney testified that he was Acting Chief Pilot for five or six months prior to being certified by the FAA in February 2002 (Tr. 847). He further testified that Frank Barber requested a variance from the FAA to allow him to be Chief Pilot because his "qualifications didn't directly match the rule" (Tr. 847-48).

According to Phinney, the Chief Pilot has some responsibility with respect to overseeing pilot scheduling (Tr. 848). However, the Chief Pilot would not normally be in a position to influence which pilot would be used by Planet Airways to handle an emergency or ad hoc request for a flight such as that made by Casino Express (Tr. 850).

Phinney was aware of Michaels's OSHA complaint but has never seen it (Tr. 859, JX-65). It is the practice of Planet Airways when an OSHA complaint is filed, and the complaint relates to something of which an employee has firsthand knowledge, to gather information from that employee about the incident (Tr. 860). Although Michaels's OSHA complaint makes reference to the purportedly illegal flight sequence in January 2002 for Casino Express, a matter about which Phinney had some knowledge, no one at Planet Airways questioned him about the incident (Tr. 860-61).

Phinney testified that the first chance he had to draft a letter to Carell Rodriguez about his concerns regarding Michaels's conduct at the March 6, 2002 meeting was five days later on March 11, 2002 (Tr. 863-64, JX-37). He could not recall whether Michaels flew between March 6 and March 11, 2002 (Tr. 864). The letter drafted by Phinney on March 11th expressed concern over "a collection of events which began on March 6th and included several threats over the period between March 6th and when the letter was written" (Tr. 865). Phinney viewed Michaels's conduct at the meeting as less threatening than the later incidents in that Michaels did not threaten Phinney personally with physical violence, nor did he curse at Phinney during the March 6th meeting (Tr. 866). When asked why he reported his concerns that Michaels was a threat to crash a plane into the ground to Rodriguez rather than the FAA, Phinney testified:

I don't believe anywhere in this letter could it be derived that I said he had a known deficiency. I think it's very, very important, sir, to understand that I also

have an obligation to the rights of the pilot, not to go off half-cocked, making accusations which I do not have enough information to back up.

I asked for counsel in this regard as soon as these instances came out. The company immediately took action. There was no lag time.

(Tr. 877).

Phinney was aware of an incident in March of 2003 involving Jeff Sicular insulting officials in Cancun, Mexico and the matter will be turned over to him for "corrective action" (Tr. 880). He denied that another pilot, Dean Birmingham, damaged a Planet Airways aircraft during landing, or that Pilot Rafael Alonso drove an aircraft into a ditch (Tr. 881). Phinney testified that members of another Planet Airways crew observed Alonso in a hotel bar beyond the times prescribed by FAA regulations and company policy for the consumption of alcohol before flying, and Alonso subsequently resigned (Tr. 883). Phinney subsequently received a call from Carlos Thompson, Chief Pilot at Laker Airways, about Alonso and told him that Alonso was "a good employee" (Tr. 885). Phinney further testified that he believed it would have been improper to discuss the incident which led to Alonso's resignation, but he informed Thompson that Alonso had not given adequate notice and that was an area Thompson needed to explore directly with Alonso. *Ibid.* Finally, Phinney also acknowledged that Pilot Bruce Menkes taxied an aircraft into a fuel truck but was still employed by Planet Airways (Tr. 886).

On re-direct examination, Phinney testified that a full investigation by the Department of Defense was conducted regarding the Menkes incident and, although Planet Airways changed some of its procedures and implemented some additional training for its crew members, the incident was resolved without any punitive action against the pilot (Tr. 888). He also testified that, with respect to the incident involving Captain Alonso, after the incident was reported to him he determined that Alonso did not actually fly the trip that he was scheduled to fly after he was seen in the hotel bar (Tr. 889). Phinney stated:

After I called Rafael and summoned him immediately into the office, the next thing I did was, I performed a trip audit in conjunction with the training coordinator of the trip envelope and the flight duty records.

And the first thing that I found out was that Captain Alonso had, in fact, not flown that trip. He had reported sick.

. . . .

. . . Additionally, it is my understanding, and I received this verbatim from Captain Barber, the entire instance was discussed with the FAA, specifically our POI and assistant POI to find out if any additional action was required on the part of the company.

(Tr. 890).

III. DISCUSSION

The whistleblower provisions of AIR21 are set forth at 49 U.S.C.A. § 42121. Subsection (a) proscribes discrimination against airline employees as follows:

No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) --

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or the Federal Government information relating to any violation or any alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or any alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in any such a proceeding; or

(4) assisted or participated or is about to participate in such a proceeding.

49 U.S.C. §§ 42121(a); *see also* 29 C.F.R. § 1979.102(b)(1)-(4).

In post-hearing briefs, the parties agree that the whistleblower provision of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851, contains the same burden of proof standards as those included in AIR21. The ERA whistleblower provision was amended by Congress in 1992 "to include a burden-shifting framework distinct from the Title VII employment-discrimination burden-shifting framework first established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-805, 93 S.Ct. 1817 (1973)." *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999). Under the ERA and AIR21, during the investigative process, Complainant is required to establish a prima facie case that his protected activity is a contributing factor in the unfavorable personnel action alleged in the complaint. *See id.* It was the intent of Congress to make it easier for whistleblowers to prevail in their discrimination suits, but it was also concerned with stemming frivolous complaints. *Trimmer*, 174 F.3d at 1101, n.5. "Even if the employee establishes a prima facie case, the Secretary cannot investigate the complaint if the employer can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's behavior. Thus, only if the employee establishes a prima facie case and the employer fails to disprove the allegation of discrimination by clear and convincing evidence may the Secretary even investigate the complaint." *Id.* at 1101.

Once the case proceeds to a formal hearing before the Secretary, the complainant must prove the same elements as in the prima facie case, but must prove by a preponderance of the evidence that he engaged in protected activity which was a contributing factor in the employer's alleged unfavorable personnel decision. *Trimmer*, 174 F.3d at 1101-02; *see also Dysert v. Sec'y of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997) (complainant's burden is a preponderance of the evidence). Thereafter, and only if Complainant meets his burden does the burden shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's behavior. *Trimmer* at 1102.

Accordingly, in an AIR21 "whistleblower" case, Complainant must establish by a preponderance of the evidence that: (1) his employer is governed by the Act; (2) he engaged in protected activity as defined by AIR21; (3) he suffered an adverse employment action, such as discharge; and (4) a nexus exists between the protected activity (as a contributing factor) and the adverse action or circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. 29 C.F.R. § 1979.104(b)(1)(i)-(iv); *Macktal v. U.S. Dep't of Labor*, 171 F.3d 323, 327 (5th Cir. 1999); *Zinn v. Univ. of Missouri*, Case No. 1993-ERA-34 (Sec'y Jan. 18, 1996); *Overall v. Tennessee Valley Auth.*, Case No. 1997-ERA-53 at 12 (ARB Apr. 30, 2001). The foregoing creates an inference of unlawful discrimination. *Id.* With respect to the nexus requirement, proximity in time is sufficient to raise an inference of causation. *Id.*

In *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1), the Court observed:

The words "a contributing factor" . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action.

Marano, 2 F.3d at 1140 (citations omitted).

If Complainant establishes by a preponderance of evidence a prima facie case showing that protected activity was likely a contributing factor in the unfavorable personnel action, then Respondent has an opportunity to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. 29 C.F.R. § 1979.104(c). In other words, Respondent may avoid liability under AIR21 by producing sufficient evidence that clearly and convincingly demonstrates a legitimate purpose or motive for the personnel action. *See Yule v. Burns Int'l Security Service*, Case No. 1993-ERA-12 (Sec'y May 24, 1995). Although there is no precise definition of "clear and convincing," the Secretary and the courts recognize that this evidentiary standard is a higher burden than preponderance of the evidence but less than beyond a reasonable doubt. *See id.* at 4.

If Respondent meets its burden to produce a legitimate, nondiscriminatory reason for its employment decision, the inference of discrimination is rebutted. Complainant must then assume the burden of proving by a preponderance of the evidence that Respondent's proffered reasons are "incredible and constitute pretext for discrimination." *Overall v. Tennessee Valley Auth.*, Case No. 1997-ERA-53 at 13. As the Supreme Court noted in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), a rejection of an employer's proffered legitimate, nondiscriminatory explanation for adverse action permits rather than compels a finding of intentional discrimination. *See also Blow v. City of San Antonio*, 236 F.3d 293, 297 (5th Cir. 2001).

In reviewing the numerous cases on the shifting burden of production and ultimate burden of proof, the U.S. Court of Appeals for the Eighth Circuit in *Carroll v. U.S. Department of Labor*, 78 F.3d 352, 356 (8th Cir. 1996), *aff'g Carroll v. Bechtel Power Corp.*, Case No. 1991-ERA-46 (Sec'y Feb. 15, 1995), observed:

But once the employer meets this burden of production, "the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981). The presumption ceases to be relevant and falls out of the case. The onus is once again on the complainant to prove that the proffered legitimate reason is a mere pretext rather than the true reasons for the challenged employment action and the ultimate burden of persuasion remains with the complainant at all times. *Burdine*, 450 U.S. at 253, 256.

Accordingly, the fact that a Complainant has established a prima facie case becomes irrelevant. Rather, the relevant inquiry becomes whether Complainant has proven by a preponderance of the evidence that Respondent retaliated against him for engaging in a protected activity. *Carroll*, 78 F.3d at 356.

A. Whether Respondent is an air carrier subject to AIR21?

Respondent does not contest, and the testimony presented at the hearing establishes, that Planet Airways is an air carrier subject to AIR21. The term "air carrier" is defined as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." 29 C.F.R. § 1979.101. Planet Airways is a privately held company which was formed in 1995, and it is owned and operated by Tony DeCamillis, Peter Garrambone, and Lou Pearlman (Tr. 746-47, 774, JX-3). It has corporate offices in Orlando and Fort Lauderdale, Florida, was certified by the FAA in 2000, and provides both domestic and international air transportation (Tr. 438-39, 672, 748, 775, 847, JX-3). Planet Airways thus falls within the definition of "air carrier."

B. Whether Complainant engaged in activities which are protected by AIR21?

"Protected activity," as defined under the Act and AIR21 regulations, includes providing to an air carrier or to the Federal Government "information relating to any violation or alleged

violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety” 49 U.S.C. § 42121(a)(1); 29 C.F.R. § 1979.102(b)(1). The definition further includes filing “a proceeding relating to any [such] violation or alleged violation,” testifying in such proceeding, or assisting or participating in such proceeding. 49 U.S.C. § 42121(a)(2)-(4); 29 C.F.R. § 1979.102(b)(2)-(4).

Complainant alleges he engaged in protected activity by: (1) participating in the OSHA investigation initiated by Don Landry; (2) providing information to Respondent and OSHA regarding the purportedly illegal flight sequence of January 13-14, 2002; (3) providing information to Respondent regarding James Phinney’s unsuitability to be Chief Pilot; and (4) filing his own OSHA complaint on January 28, 2002. Post-Trial Br. of Comp. at 26-28. Respondent has addressed in its post-hearing brief only Michaels’s allegation that his refusal to fly a purportedly illegal flight sequence on January 13-14, 2002 was a protected activity. Resp. Post-Hearing Br. at 21-23. I find that each of the activities identified by Complainant falls within the definition of “protected activity.” I further find that the evidence adduced at trial clearly establishes Complainant participated in the specified activities and that such conduct was thus “protected.”

(1) Complainant’s participation in the OSHA investigation initiated by Don Landry.

Donald Landry was discharged by Planet Airways on September 27, 2001 (Tr. 515). The following day, he called OSHA and spoke with Investigator Mike Moon about Respondent’s alleged practice of scheduling illegal flight crew sequences and ignoring mechanical malfunction reports (Tr. 106, 515). He thereafter requested Michaels’s assistance, and Michaels provided Landry with an affidavit to give to Moon to assist in his investigation (Tr. 97, 106-07, JX-54). Michaels also talked with Moon, first by telephone and later in person, about Landry’s allegations (Tr. 108).

OSHA’s investigation of Landry’s complaint is clearly a “proceeding relating to [a] violation or alleged violation of [a] . . . regulation, or standard of the [FAA]” 29 C.F.R. § 1979.102(b)(2). Landry asserted in his complaint that Planet Airways had engaged in a practice of scheduling illegal flight crew sequences and ignoring mechanical malfunction reports pertaining to its aircraft either of which would violate FAA regulations. Whether Landry’s allegations were subsequently verified is irrelevant inasmuch as the plain language of the statute requires only an “alleged violation” of FAA regulations. *Id.* Since Michaels unquestionably “assisted or participated” in this investigation, his conduct was protected under the provisions of AIR21. 49 U.S.C. § 42121(a)(4); 29 C.F.R. § 1979.102(b)(4).

(2) Complainant’s providing information to Respondent and OSHA regarding an illegal flight sequence which occurred January 13-14, 2002.

Michaels complained to Planet Airways personnel that a flight sequence he was scheduled to begin January 13, 2002 required him to fly more hours in a twenty-four hour period than was

permitted under FAA regulations (Tr. 139). He spoke initially to Kelly Raphael about the apparent violation and then to Jim Phinney (Tr. 143-44, 146, JX-60). Phinney reviewed the schedule and told Michaels that flying only part of the trip (from Fort Lauderdale, Florida to Elko, Nevada) would not violate FAA regulations (Tr. 149). When he arrived in Elko, Michaels reported to DeAnna Desmond that he could not fly the aircraft again until he and his crew had rested for 16 hours and 35 minutes (Tr. 150-51). The remaining leg of the trip was cancelled (Tr. 152-53, 832).

Among the activities which are protected by AIR21 is providing information to an air carrier “relating to any violation or alleged violation of any order, regulation, or standard of the [FAA]” 49 U.S.C. § 42121(a)(1); 29 C.F.R. § 1979.102(b)(1). Michaels’s provided to Planet Airways personnel, including his supervisor Jim Phinney, information alleging that the flight crew sequence he had been scheduled to fly on January 13-14, 2002 was “illegal.” Such conduct is clearly protected by the Act and the regulations promulgated thereunder.

(3) Complainant’s providing information to Respondent regarding Phinney’s unsuitability to be Chief Pilot.

Michaels complained to Anthony DeCamillis that Phinney was not qualified to be Chief Pilot and threatened to go “to Washington” if Phinney was not removed from that position (Tr. 753). He told DeCamillis that it was the responsibility of the Chief Pilot to act as a liaison between Respondent’s management and its pilots and to “always defend[] his pilots until it becomes evident that it is no[] longer possible to do so” (JX-64). He further informed DeCamillis that Phinney had obtained “a waiver [from the FAA] issued by individuals of questionable integrity . . . [who were then under investigation].” *Ibid.* During a meeting with Phinney and Rodriguez, Michaels complained about Phinney’s performance and stated that he did not believe Phinney was qualified or competent to be Chief Pilot (Tr. 822).

Jim Phinney was Acting Chief Pilot at Planet Airways for five or six months prior to being certified by FAA as Respondent’s Chief Pilot in February 2002 (Tr. 847). Frank Barber, Respondent’s VP and Director of Operations, requested and received a variance from the FAA to allow Phinney to become Chief Pilot (Tr. 847-48). Whether true or not, Michaels’s complaints to Respondent’s top management that Phinney did not meet the necessary qualifications to be Chief Pilot were protected activities for the same reasons stated above regarding Complainant’s reports of a purportedly illegal flight sequence in January 2002. The plain language of the statute and regulations speaks of providing information to an air carrier relating to a violation, or an *alleged* violation, of FAA regulations. 49 U.S.C. § 42121(a)(1); 29 C.F.R. § 1979.102(b)(1). Therefore, Michaels’s conduct in this instance is also protected.

(4) Complainant’s Filing of his OSHA complaint on January 28, 2002.

On January 28, 2002, Complainant met with Investigator Moon regarding the Landry investigation and told him that Planet Airways was continuing to schedule flight crews for duty in

an illegal manner and that he was now being harassed (Tr. 111). Moon suggested that Michaels file his own OSHA complaint which he did shortly thereafter (Tr. 112-13, 116, JX-65). Michaels's complaint alleged that he was being "harassed by Planet Airways Flight Operations Department under the command of the V.P. of Operations Frank Barber" in retaliation for assisting in the Landry investigation being conducted by OSHA (JX-65).

The statute and regulations protect individuals who file OSHA complaints relating to alleged violations of FAA regulations pertaining to air safety. 49 U.S.C. § 42121(a)(2), 29 C.F.R. § 1979.102(b)(2). An allegation that pilots are being required by an air carrier to exceed the number of hours permitted under FAA regulations clearly relates to air safety, and Michaels's conduct in this regard is also protected.

C. Whether Respondent knew or suspected, actually or constructively, of such activity?

Some or all of Respondent's top management were clearly aware of Michaels's conduct, including his contacts with OSHA regarding Landry's and his own OSHA complaints, his allegations that a flight sequence in January 2002 was illegal, and his complaint that Jim Phinney was not qualified to be Chief Pilot. Frank Barber, Respondent's VP and Director of Operations, knew Complainant was a witness in Don Landry's OSHA proceeding and that he had filed an OSHA complaint himself (Tr. 441, 445). Carell Rodriguez, Respondent's Human Resources Manager, regularly interacted with OSHA Investigator Michael Moon and arranged for him to meet with 20 to 25 witnesses relating to the ongoing OSHA investigations (Tr. 602-03). Michaels told Rodriguez, Phinney, and Barber on February 1, 2002 that he had filed his own OSHA complaint (Tr. 629). In early March he met with Phinney and Rodriguez and stated that Phinney was not qualified to be Chief Pilot and he would go to the FAA if Phinney did not resign (Tr. 642, JX-37). Phinney and Rodriguez were also told by other Planet Airways employees that Michaels was making statements to them that Phinney was not qualified to be Chief Pilot (Tr. 643, JX-38). Michaels made similar statements to Anthony DeCamillis (Tr. 753).

D. Whether Complainant suffered an unfavorable personnel action?

AIR21 expressly provides that an air carrier may not "discharge . . . or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment" 49 U.S.C. § 42121(a); *see also* 29 C.F.R. § 1979.102(a). Complainant has alleged, and I find, that he suffered an unfavorable personnel action when his employment with Planet Airways was terminated on March 13, 2002.

E. Whether Complainant's activity was a contributing factor in the unfavorable personnel action?

Although Complainant has demonstrated that he engaged in conduct protected by AIR21, and that he thereafter suffered an adverse employment action, he must further show that his

conduct was a contributing factor in his discharge in order to prevail in this litigation. This he has not done.

At the core of Michaels's complaint is his assertion that he is a highly respected and successful pilot who was never previously subjected to disciplinary action by Respondent until approximately August 29, 2001 when he became involved in the OSHA investigation initiated by Don Landry (*See, e.g.*, Tr. 74-5, 85-6, 95, 97, 106-08, 119-21). Then, according to Complainant, Respondent's management personnel began systematically "papering his file" with bogus and trivial reprimands as a pretext for his discharge (*See, e.g.*, Tr. 121-28, JX-27, JX-28, JX-32). Although this version of events finds some support in the testimony of Barber, Landry, and Complainant himself, their testimony is generally contradicted both by the documentary evidence of record and by the testimony of Rodriguez, DeCamillis, and Phinney, all of whom I find to be more credible witnesses.

Complainant's knowledge, skills, and abilities as a pilot are impressive, and they have never been challenged in this litigation. Furthermore, it is evident that he sincerely and reasonably believed the activities identified in his complaint represented legitimate concerns regarding airline safety. However, Michaels's ability to interact with others is quite another matter. What is abundantly clear from the record in this case is that Complainant consistently responded poorly to situations in which his judgment, decisions, conduct, or authority were challenged. Michaels reacted to any criticism, whether valid or not, with open hostility and disdain. When either his judgment or conduct were called into question, his most frequent response was to deny responsibility and attack the character or qualifications of the reporting individual. In the end, it was Complainant's anger and lack of respect for others, not his protected activity, which led to his discharge.

Michaels began working as a Pilot for Planet Airways in December 2000 (Tr. 750). Not long thereafter, he received a February 2, 2001 memorandum from Jeffrey Sicular stating that he had failed to follow proper procedures regarding logbook entries during a recent trip. Complainant responded to the memorandum with a letter to Sicular in which he said Sicular failed to follow proper procedures in reporting the incident and was engaging in an "illegal act of impersonation" by signing the memorandum as Respondent's Chief Pilot (JX-6). Michaels refused to recognize Sicular as his supervisor and considered the February 2, 2001 memorandum "a waste of five pages" (Tr. 255-56). In a conversation with then-Director of Operations Frank Barber, Michaels described the Sicular memorandum as a "bunch of hot air" and referred to Sicular as a "rookie pilot," a "kid," and a "handyman at the office" (Tr. 252-53, 258-59, 270-71).

On April 13, 2001, DeAnna Desmond, who worked in Respondent's Crew Scheduling Department, was unable to contact Michaels regarding an upcoming flight. As a result, another pilot took the flight and a "Crew Scheduling U.T.C. Form" was completed recommending that eight and one-half hours be deducted from Complainant's pay (JX-7). In an April 19, 2001 letter to then-Chief Pilot Gerry Davis, Michaels complained that Desmond's report of the incident was incomplete and stated that Davis should reconsider his decision (JX-9). The recommendation to

reduce Complainant's pay was adopted after considering Michaels's explanation of why he had not responded to the calls from Respondent's Crew Scheduling Department (JX-10, JX-11, JX-12).

On August 19, 2001, Michaels ignored direct instructions given to him by a Planet Airways representative when he took transportation provided by Respondent and left three members of his crew stranded at the Miami International Airport (JX-19, JX-20). One of his crew members, Flight Attendant Monica Campbell, was delayed in clearing U.S. Customs because she was a Columbian national immigrating to the United States and did not have a completed I-94 Form with her when the flight arrived in Miami (JX-14-15, JX-20). When Senior Flight Attendant Crystal Patterson requested that Michaels and the rest of the crew wait for Campbell in the baggage area, Michaels refused saying "No, call her parents to come get her" (JX-14). While Michaels and the crew waited outside Concourse B for transportation, Patterson went inside to leave a message for Campbell. *Ibid.* Al-Jean Adkins, another Flight Attendant, also went inside to get a soda (JX-13). When Patterson and Adkins returned, Michaels and the rest of the crew had left the airport in the van provided by Planet Airways for crew transportation (JX-13-14). Jeffrey Sicular called Michaels on his cell phone after receiving a call regarding Campbell and the other Flight Attendant's being stranded. Michaels confirmed to Sicular that he made no effort to intercede with Customs on Campbell's behalf, stated he was already half way to Fort Lauderdale and would not return to the Miami airport, and said Campbell could find her own way home (JX-20).

On August 20, 2001, Michaels left Fort Lauderdale without taking on enough fuel to make a round-trip flight to the Bahamas (JX-19, JX-21). As a result he had to purchase additional fuel in Nassau which cost Planet Airways an additional \$1,000. *Ibid.*

On August 24, 2001, Michaels interrupted a pre-flight briefing of Flight Attendants Svetlana Shehtman, Lauren Wallace, and Monica Campbell being conducted by Senior Flight Attendant Zlata Archy (Tr. 296-97, JX-17-18). According to a memorandum from Archy:

When I asked crewmembers if they have all required items with them including passport, Capt. Michaels started to scream and pointing at Monica Campbell said that "this one does not have proper documentation". Monica Campbell showed me her Colombian passport and INS authorization for multiple entering/exiting of the USA. All that time Capt. Michaels continued talking in a very demeaning, offensive and disrespectful way. I had to stop him and advise him that she had proper papers, which the company had previously verified. I found the whole scene to be very disturbing especially knowing that we had a long working day ahead of us. . . .

(JX-18). Campbell also wrote a memorandum regarding the incident in which she noted that Michaels talked to Zlata Archy after the briefing and asked "How come this f---ing flight attendant is working with us today" (JX-17, JX-19).

On August 26, 2001, Michaels again left Flight Attendant Monica Campbell at Customs in Miami and took Respondent-provided transportation to Fort Lauderdale (JX-19).

Frank Barber issued a "Notice of Intent to Reprimand" Michaels on August 28, 2001, a copy of which was hand-delivered to him on August 29, 2001 (Tr. 102, JX-19).

Michaels met with Capon and Barber on August 29, 2001, and a "Record of Verbal Warning" concerning these matters was thereafter signed by Capon on September 4, 2001 (Tr. 298-99, JX-19, JX-21). The "Record of Verbal Warning" notes, in part:

I have, on this date, spoken to the employee, stating that the above conduct is not acceptable, and if repeated will become the basis for formal disciplinary action.

I have also informed said employee that the imposition of disciplinary action, up to and including termination, is not pre-conditioned upon receipt of verbal or written notice of unacceptable conduct.

(JX-21).

On December 16, 2001, U.S. Customs issued a "Notification of Violation (Warning)" to Planet Airway relating to a "clearance violation" in the Bahamas involving an aircraft piloted by Michaels (Tr. 798-99, JX-55). The notice stated, in part, that "the pilot or other individual in charge of an aircraft is responsible for insuring that all reporting requirements to U.S. Customs are fulfilled," and warned Respondent that future violations could result in the assessment of several thousands of dollars in civil penalties (JX-55). On December 20, 2001, then-Chief Pilot Phinney spoke with Michaels by telephone and subsequently drafted a memorandum to Michaels requesting a written statement describing Complainant's recollections of the incident (Tr. 799, JX-24). On January 21, 2002, when he had not yet received a response from Complainant, Phinney drafted a second memorandum to Michaels asking him to reply by 5:00 p.m. the following day (JX-28). In an email dated January 22, 2002, Michaels denied having received the December 20, 2001 memorandum, noted that there were typographical errors regarding certain dates in the memorandum, and stated that he resented being given less than four hours to respond to an incident which occurred thirty-seven days earlier (JX-29). Complainant also explained to Phinney that he believed the flight had been pre-cleared and had therefore not taken any action with respect to obtaining Customs clearance himself. *Ibid.*

On January 19, 2002, Phinney wrote a memorandum to Michaels regarding some charts that had apparently been left in the cockpit of an aircraft piloted by Complainant. The memorandum stated:

The next crew found the enclosed charts in A/C 742. If time permits, please clean these things up after your trips. Thanks in advance for your help.

(JX-27). The memorandum and charts were left by Phinney in Complainant's personal mail box at Respondent's Fort Lauderdale facility (Tr. 123-24). Michaels responded with a handwritten notation stating "This garbage is not mine[.] Regards" which Complainant appended to the memorandum before placing it and the accompanying charts in Phinney's personal mail box (JX-27).

On January 16, 2002, Tracy Gold requested that Michaels bring his manuals to the Technical Publications Office so they could be reviewed. When Michaels arrived the following day, he brought only two manuals with him and both manuals were missing revisions (JX-26). When Michaels was asked by Gold to fill out the "issue page" of the manuals with his name and employee identification number, he refused to do so. According to Gold's January 17, 2002 memorandum describing the incident, Michaels became very loud, rude, and abrupt and demanded that he not be treated like a child. Gold's memorandum further notes:

I asked him one more time and [when] he refused again, I advised him at that point that if he chooses not to fill out that sheet that I would notify Jim Phinney. He told me don't threaten me and I advised ["I'm not threatening you I'm advising you of what I'm going to do if you choose not to update you[r] manual properly. . . ."]

As a captain I think that Luis should be setting the example to the other crewmembers by keeping his manuals up to date and following the instructions provided with each revision. I feel the treatment I received from him this morning was very unprofessional and uncalled for.

(JX-26). It was clear to Jim Phinney, after talking to Gold, that the incident was very upsetting and demeaning to her (Tr. 817-18).

On February 1, 2002, Michaels met with Phinney, Barber, and Rodriguez to discuss the Customs clearance violation, the incident involving Tracy Gold, and Michaels's response to Phinney's memorandum regarding the charts allegedly left by Complainant in the cockpit of an aircraft (Tr. 352, 443-45, 609-13, 617-25, 803-06, JX-33). The meeting lasted approximately two hours and was tape recorded by Michaels (Tr. 622-23, JX-33). The recording of the meeting clearly demonstrates that Complainant continued to deny any culpability with respect to these incidents. Michaels frequently interrupted the others, disputed the accuracy of much of the information documenting the three infractions, and argued that the timing of Phinney's reports of them was highly suspicious in that they all occurred after Michaels became involved in the investigation of Don Landry's OSHA complaint. Phinney denied that any of the reports of these events were related to Complainant's interactions with OSHA and pointed out that the Customs clearance violation was a matter over which he had absolutely no control. Phinney further explained that he had an obligation as Chief Pilot to conduct an inquiry with respect to all written complaints involving pilots under his command, that he had done so in these three instances, and that the whole purpose in contacting Michaels was to give him an opportunity to give his version of the events.

Michaels's explanation during the February 1st meeting with respect to the charts found in the cockpit of the aircraft flown by Complainant was satisfactory, and Phinney informed Michaels that it was no longer a matter with which he should be concerned. Phinney further informed Michaels that if he and Tracy Gold were able to work out their differences with respect to the January 17th incident, that matter would also not be pursued any further by management. However, Phinney told Michaels that a letter would be issued regarding the Customs violation since it was a serious matter which had exposed the company to potential fines of up to \$35,000. Complainant disputed that such a letter was necessary, but Phinney hand-delivered a letter to Michaels three days later informing him that further occurrences could lead to "corrective action up to and including termination" (JX-34). Phinney had been reluctant to draft the letter but Barber, who stated he wanted to fire Michaels before the February 1st meeting, insisted the letter be written (Tr. 616).

Rodriguez had been relatively upbeat after the meeting with Complainant and believed Michaels would be "less combative" and more of a "team player" thereafter (Tr. 625-26). He was less optimistic that Michaels intended to mend his ways, however, after reviewing an email sent by Michaels to Phinney the next day which suggested Complainant believed "he had zero culpability and that he was right and everyone else was wrong" (Tr. 627, JX-31) *Ibid.*

On February 15, 2002, Frank Barber's employment with Planet Airways was terminated because he had retaliated against employees for voicing safety concerns, sexually harassed female employees, and engaged in conduct which was inconsistent with the values of the organization (Tr. 601). Landry and Insua, both of whom had complained to OSHA about Barber, were thereafter reinstated and paid between \$50,000 and \$100,000 (Tr. 604-05). In addition, the day following Barber's discharge, Phinney and Rodriguez met and agreed to "void" the Customs violation letter to Michaels after Michaels came to Rodriguez and thanked him for firing Barber (Tr. 632-33, JX-34).

With Barber gone, and Michaels's recent transgressions "forgiven," Respondent's management and Michaels had good reason to believe that their relationship would improve. Unfortunately, this temporary peace was shattered after Michaels reviewed his personnel file in early March and became irate when he discovered that several documents, including the February 4, 2002 letter relating to the Customs clearance violation, had not been destroyed. In light of statements made to Complainant by Phinney and Rodriguez, Michaels could legitimately express surprise to see these documents in his file. However, his response to the situation was totally inappropriate, and it was that conduct, not the events preceding it, which led to Respondent's decision to discharge him (Tr. 649, 758, 836, 865-66, 877, JX-36).

Michaels requested a meeting with Rodriguez and Phinney after reviewing his personnel file in early March (Tr. 636). During a March 6, 2002 meeting, he shouted, pounded his arms on the table, and demanded that Phinney resign (Tr. 637, 641-42). According to Rodriguez:

Luis attacked Jim both professionally and personally. Luis disagreed with Jim's management style and did not agree with his Chief Pilot status. Luis demanded that Jim resign immediately stating that Jim had no credibility, no integrity, poor management skills, was a liar, and was unqualified. Luis seemed abnormally agitated. Luis threatened the company when he said that either the company removes Jim from his position or he goes to Washington.

(JX-39). Rodriguez was "uncomfortable" during the meeting and was concerned for Phinney's physical safety. *Ibid.* Phinney had never seen another pilot act the way Michaels had acted at the meeting (Tr. 840). Michaels's behavior thereafter caused further concern.

On March 11, 2002, Phinney sent a letter to Rodriguez in which he recommended that Michaels be discharged (JX-37). Rodriguez reviewed the letter and other documentation including a memorandum from DeAnna Desmond in which she described two telephone conversations with Michaels the previous day (Tr. 643, JX-38, JX-42). Michaels said during one of the conversations that: he would no longer deal with Phinney; Phinney was his enemy; Phinney had "f---ed him;" and he was going to "f—" Phinney (JX-38). Dean Chapman, Respondent's Chief Dispatcher, was with Desmond when she received the telephone calls from Michaels and stated that she was visibly distressed as a result of the conversations (Tr. 645, JX-41). Dean Birmingham, a Planet Airways pilot, also described Complainant around this same time as "being in an odd, irregular, in an abnormal emotional state, making comments that did not really make sense, but . . . [which] were threatening, threatening to Mr. Phinney" (Tr. 647, JX-40).

After reviewing Phinney's letter and the attached documentation, Rodriguez agreed that Michaels should be fired and sent a facsimile message to Tony DeCamillis recommending his employment be terminated (JX36). Because Michaels was "perceived to be a potential safety/work place violence risk," that recommendation was approved by DeCamillis and Peter Garrambone *despite* the risk to the company that Michaels might thereafter pursue his OSHA complaint (Tr. 649-50, 758, 765, JX-36, JX-43).

To prevail in this litigation, Complainant is required to establish by a preponderance of the evidence that he engaged in protected activity, of which Respondent was aware, and such protected activity was a contributing factor leading to his discharge. Michaels's contacts with OSHA, his report of a perceived illegal flight sequence in January 2002, and the concerns he expressed over the qualifications of Jim Phinney to be Chief Pilot, as noted above, all qualify as "protected activity." Furthermore, there is no question that Respondent was fully aware of these activities. However, it is also quite apparent, and consequently I find, that none of these activities contributed to Respondent's decision to terminate Michaels's employment. On the contrary, it was Complainant's anger and intemperate remarks in the early weeks of March which led directly to his discharge on March 13, 2002. Complainant has thus failed to sustain his burden of proof, and it is unnecessary to further determine whether Respondent has presented clear and convincing evidence that it would have discharged Michaels despite his protected activity.

IV. ORDER

Based upon the foregoing, Complainant Luis Michaels has failed to establish that his protected activity was a contributing factor in Respondent Planet Airways's decision to discharge him, and the complaint is therefore DISMISSED.

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STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or email communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b), as found in OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21, 2003).